84-1621

No. _____

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1984

OCCIDENTAL OIL SHALE, INC.,

Petitioner,

v.

STATE BOARD OF LAND COMMISSIONERS OF COLORADO AND ITS MEMBERS, ROWENA ROGERS, JOHN S. WILKES, III AND TOMMY NEAL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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April 15, 1985

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Supreme Court of Colorado correct in concluding that this Court's decision in *Andrus v. Utah*,[1] construing the Taylor Grazing Act,[2] repudiated its long-standing principle[3] that equitable title to the public lands vested immediately in the State upon the proper filing of its land selection and waiver of its rights in the original grant lands under the indemnity statutes?[4]

2. If so, should not this issue be reconsidered in view of the special facts[5] presented in this case?

3. Prior to any ruling by the Secretary of the Interior that the value of the indemnity lands selected by the State of Colorado greatly exceeds the value of its original grant, does not equitable title to indemnity lands pass to the State upon the proper filing of its selections?

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1 446 U.S. 500 (1980).

2 43 U.S.C. §§ 315, 315f (1982).

3 *Payne v. New Mexico*, 255 U.S. 367 (1921), and *Wyoming v. United States*, 255 U.S. 489 (1921).

4 43 U.S.C. §§ 851, 852 (1982).

5 Among these is the fact that this case was tried on a stipulation entered into between the parties more than a year after *Andrus* was decided, which conceded that upon the filing of selections "there was vested in the State the full equitable title to and interest in the lands selected." Although this stipulation had been approved by the Colorado District Court and was relied upon by that court in rendering its decision in Petitioner's favor, nevertheless, on further appeal to the Colorado Supreme Court the Respondents withdrew the stipulation during oral argument. Second, after Petitioner's application for an oil shale exploration permit was filed, Colorado amended its mineral location statute to exclude any such applications for oil shale, thereby forfeiting Petitioner's prior discovery rights unless this Court now grants the relief requested. Third, despite the fact that tens of thousands of acres of oil shale lands are located in the State of Colorado, Colorado received no such lands because, at the time of its admission to the Union, all such land was located within a subsequently extinguished Ute Indian Reservation. This is in stark contrast to the Utah school land grant, where the State did in fact receive a cross section of the oil shale lands within its boundaries.

4. Was the Colorado Supreme Court wrong in holding that, until the Secretary of the Interior has approved Colorado's land selections, the State has neither equitable nor legal title but "only an incipient prospect of future ownership of the selected lands"?[6]

5. Should not the Taylor Grazing Act[7] be made consonant with the statutes providing for indemnity lands[8] so that equitable title immediately vests in the State unless and until the selections are rejected by the Secretary of the Interior in the proper exercise of his discretion?[9]

PARTIES TO THE PROCEEDING

(1) Occidental Oil Shale, Inc., a California corporation ("Occidental"); (2) the State Board of Land Commissioners of Colorado, an agency created by the Colorado Constitution ("Board" or "State Board"); and (3) the following three persons who are members of the Board above described: (a) Rowena Rogers, (b) John S. Wilkes, III,[10] and (c) Tommy Neal. The following are parents or affiliates (with publicly traded stock) of Occidental Oil Shale, Inc.: Occidental Petroleum Corporation, Canadian Occidental Petroleum Ltd., The Southland Corporation, Occidental International Exploration and Production Company, Occidental Oil and Gas Corporation and Occidental Petroleum Investment Company.

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6 *Occidental Oil Shale, Inc. v. State Board of Land Commissioners of Colorado,* 692 P.2d 321, 324 (Colo. 1984).

7 43 U.S.C. §§ 315, 315f (1982).

8 43 U.S.C. §§ 851, 852 (1982).

9 In this case there is no dispute that the Secretary of the Interior has neither approved nor disapproved the Colorado land selection even though almost six years have passed since it was filed. During this time, Colorado has enjoyed no beneficial use of the selected lands.

10 Pursuant to United States Supreme Court Rule 40, Occidental substitutes and names John S. Wilkes, III, the successor to one of the original defendants, William H. Claire, as a member of the State Board of Land Commissioners of Colorado.

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PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

Petitioner Occidental Oil Shale, Inc. prays that a writ of certiorari issue to review the judgment and opinion of the Colorado Supreme Court entered in this proceeding on December 10, 1984.

OPINIONS IN THE COURTS BELOW

On May 14, 1982, the District Court for the City and County of Denver issued an unreported decision reversing an administrative decision of Respondent State Board of Land Commissioners. See Appendix C. The administrative decision of Respondent State Board is set forth in letters dated October 16 and October 22, 1979, copies of which are reproduced in Appendix E. On December 10, 1984, the Colorado Supreme Court reversed the decision of the Denver District Court. See Appendix A. The Colorado Supreme Court decision is reported at 692 P.2d 321 (Colo. 1984), *Occidental Oil Shale, Inc. v. State Board of Land Commissioners of Colorado ("Occidental v. State Board").*

JURISDICTION

The final judgment of the Colorado Supreme Court was entered on December 10, 1984. Occidental's petition for rehearing was denied by that Court on January 14, 1985. See Appendix B. Jurisdiction of this Court to review the decision of the Colorado Supreme Court is conferred by 28 U.S.C. § 1257(3) (1982).

STATUTORY PROVISIONS

Statutes involved are the Act of March 3, 1875, § 7, 18 Stat. 474 (the Colorado Enabling Act); 43 U.S.C. §§ 851, 852 (1982) (statutes providing for indemnification of public land states); 43 U.S.C. §§ 315 and 315f (1982) (Sections 1 and 7, respectively, of the Taylor Grazing Act); and Colo. Rev. Stat. § 36-1-140 (1973) (Colorado's Mineral Location Law). The relevant text of these statutes is reproduced in Appendix F.

STATEMENT OF THE CASE

Federal Grant of School Lands. As a matter of early policy, Congress made grants of federal land to each state entering into the Union after 1802. Among the purposes for such grants was the support of public schools. As consideration for these federal grants, the public land states agreed (i) not to tax the federal land within the state, and, (ii) to commit the resources granted to the support of public schools. Accordingly, Colorado was granted over 4,000,000 acres of federal land in 1876 upon statehood. Colorado was granted Sections 16 and 36 of each township in Colorado for the support of its schools. In Colorado, as with other public land states, title to the granted school lands did not pass immediately, but rather remained in the federal government until after the official land surveys had been completed.

As was true in other public land states, the surveys which would identify, among other things, Sections 16 and 36 were not

completed until many years after statehood. However, in the meantime, other methods of gaining property interests in or title to federal lands (such as mineral locations or homesteads) or reservations of the public domain by the Federal Government (such as the creation of National forests or Indian reservations) were not held in abeyance pending survey. Consequently, in numerous instances the school lands granted to Colorado (Sections 16 and 36) were in fact unavailable at the time of survey due to prior federal commitments or withdrawals. Therefore, pursuant to Section 7 of the Colorado Enabling Act and the federal laws regarding land grants and indemnification, Colorado was required to waive its rights to those lands which had been granted to Colorado but which had been sold or otherwise disposed of by the United States, before Colorado could select, in lieu thereof, other available federal lands known as "indemnity lands." This indemnification procedure insured that Colorado, as well as the other public land states, would receive the full benefit of their bargain with the Federal Government. For more than a century, the indemnity process has been in operation.[11] To ensure that the indemnity privilege is lawfully exercised, the selections are subject to review and approval by the Secretary of the Interior. The Secretary's approval of a selection is referred to as the "clearlisting" of a selection. The indemnification statutes are currently codified at 43 U.S.C. §§ 851, 852 (1982).

Colorado's Indemnity Selection. Following numerous indemnity selections over the years, in September of 1979 the State of Colorado (acting through the Respondent State Board) submitted a list of certain lands to the Bureau of Land Management for approval by the Secretary of the Interior. This list identified 6,840 acres of oil shale land ("Selected Lands") selected by Colorado as indemnity for certain school lands granted to

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[11] Arizona, California, Colorado, Idaho, Montana and Wyoming currently have remaining indemnity selection entitlements. Oregon and the United States are presently involved in a dispute as to whether Oregon has an additional indemnity entitlement. Utah has pending selections which concern all of its remaining indemnity acreage. See map on page 17 of this Petition.

Colorado but which had been sold or otherwise disposed of pursuant to other Acts of Congress. Colorado's selection complied with 43 U.S.C. §§ 851, 852 in all respects. In its selection, Colorado certified that it was selecting mineral lands in accordance with 43 U.S.C. § 852(a)(1) because the original grant lands (base lands) supporting the selection were mineral in character. Although this selection has been pending for almost six years, as of the date of this petition the Secretary of the Interior has neither approved nor disapproved it.

Occidental Properly Located and Filed Its Mining Claims With Colorado. At the time of the Colorado selection, Occidental was active in oil shale development and had pioneered the modified *in situ* process for the recovery of shale oil. Because Occidental was interested in leasing the oil shale lands selected by Colorado, Occidental located mineral claims on such lands pursuant to Colorado's Mineral Location Law, Colo. Rev. Stat. § 36-1-140 (1973). Appendix F contains a copy of that statute. It provides that Colorado mineral locators may receive a priority right to explore and subsequently lease mineral lands belonging to the State by locating mineral claims and notifying the State Board of the locators' intent to explore and lease the mineral lands upon which the claims were located. Under this Colorado statute, mineral locators first receive an exploration permit and, ultimately, a state lease.

Respondents Erroneously Asserted Legal Title Was Necessary and Rejected Occidental's Application. Although the Board admitted in administrative hearings that Colorado had equitable title to the Selected Lands, it denied Occidental's request for an exploration permit on the ground that the State did not yet have legal title to the Selected Lands. Occidental agreed that Colorado did not yet have legal title to the Selected Lands. However, Occidental brought to the attention of the Board this Court's decision in *Wyoming v. United States,* 255 U.S. 489 (1921) (*"Wyoming"*), and advised the Board that the *Wyoming* decision clearly demonstrated that public land states may make commitments with regard to selected lands prior to obtaining

legal title thereto. The practice of public land states for more than a century had been to grant rights in selected but not yet clearlisted lands, subject to the possibility of defeasance if the selection were not approved by the Secretary of the Interior. Indeed, some states made selections based upon rights previously granted to private parties. *See Calif. ex rel. Hastings v. Jackson,* 112 U.S. 233 (1884). Although admitting that Colorado held equitable title, the Board nevertheless refused to grant Occidental's exploration permit, contending that no commitments could be made with respect to the Selected Lands absent legal title. No authority was cited in support of the Board's decision, and it was contrary to the decisions of this Court in *Wyoming* and *Payne v. New Mexico,* 255 U.S. 367 (1921) (*"Payne"*). By letters dated October 16 and 22, 1979, the Board notified Occidental of its decision. See Appendix E.

Colorado Conceded in a Formal Stipulation That It Had Equitable Title. Occidental timely appealed the Board's decision to the District Court for the City and County of Denver. This Court's decision in *Andrus v. Utah,* 446 U.S. 500 (*"Andrus"*), was issued in May of 1980. Approximately 16 months after *Andrus* was announced, with the express approval of the Denver District Court, Petitioner and Respondents agreed to clearly define the controverted legal issue, and stipulated that the court:

> will decide whether the subject [Selected] lands belong to the state under 1973 C.R.S. 36-1-140 on the basis of the following facts:
>
> a. Upon the filing of the State Board of Land Commissioners' selection application with the Bureau of Land Management on September 4, 1979, there was vested in the State the full equitable title to and interest in the lands selected.
>
> b. Legal title to the lands will not vest in the State until the lands are clear-listed by the Secretary of the Interior.

The stipulation of the parties and court order dated September 14, 1981 is attached hereto as Appendix D. After briefing and argument, the District Court entered its judgment (Appendix C) concluding that the Selected Lands did belong to Colorado and were within the scope of the Colorado Mineral Location statute, Colo. Rev. Stat. § 36-1-140 (1973). The District Court concluded that the Board erred in denying Occidental's request for an exploration permit. The District Court held that, when the Board submitted the selection documents to the Bureau of Land Management, Colorado acquired equitable title to and interest in the Selected Lands and that Colorado had acquired such an interest in the Selected Lands so as to open such lands to mineral claim locations under Colo. Rev. Stat. § 36-1-140 (1973). In so holding, the District Court expressly relied upon this Court's decisions in *Wyoming* and *Payne*. Respondents subsequently appealed the decision of the Denver District Court to the Colorado Supreme Court.

Colorado Repudiated Its Own Stipulation. On appeal, the Colorado Supreme Court was called upon to determine whether the State of Colorado could make commitments with regard to selected, but not yet clearlisted, indemnity lands. As in the District Court below, the case was briefed before the Colorado Supreme Court on the basis of the stipulation of the parties, as approved by the District Court, that Colorado had full equitable title and interest to the Selected Lands. However, during oral argument and in response to questions propounded by the Colorado Supreme Court, the Colorado Attorney General stated that the State had reconsidered and changed its position with regard to the possession of equitable title — concluding and announcing that, in the Attorney General's opinion, Colorado did not have equitable title to the Selected Lands by reason of this Court's decision in *Andrus*.

Colorado Supreme Court Erroneously Concluded That This Court Had "Undermined" Its Prior Decisions. The Colorado Supreme Court ruled that equitable title to selected lands no longer passes to a public land state upon selection

because of that court's interpretation of *Andrus.* Relying upon such an erroneous interpretation of *Andrus,* the Colorado Court asserted that the "foundation . . . for the conclusion that the state has an equitable interest in selected lands," as stated in *Wyoming,* had been "undermined" by the legislation and executive action described in *Andrus. Occidental v. State Board,* 692 P.2d at 324. The Colorado Supreme Court went on to say that the Secretary of the Interior had such broad discretion to determine whether to approve indemnity selections that the Secretary was no longer "restricted to 'determining whether an existing privilege conferred by Congress had been lawfully exercised'." *Id.* Consequently, that Court concluded that a selecting state has "only an incipient prospect of future ownership of the selected lands . . . " and that "a state now obtains no assurance that it will receive all or any selected indemnity lands until . . . classification." 692 P.2d at 324, 325. In response to such ruling and after a denial of its petition for rehearing, Occidental has timely filed this petition.

REASONS FOR GRANTING THE WRIT

The essence of this petition is that the Court's decision in *Andrus* has been misinterpreted and broadened beyond the intention of this Court, majority and minority. *Andrus* clearly held that an indemnity selection is the exercise of a "right" obtained under a "solemn agreement" among the public land states and the United States. Neither the majority nor, of course, the minority intended to indirectly repeal the indemnity land statutes, or its long established principles announced by this Court in the *Payne* and *Wyoming* cases.

The principle that equitable title vests upon the proper filing of a selection was established more than sixty years ago in *Payne* and *Wyoming.* However, the Colorado Supreme Court has misapplied the decision in *Andrus* by concluding equitable title no longer vests and that indemnity selections are merely proposals to be considered by the Secretary of the Interior, rather than the exercise of a right founded in the solemn indemnity

compact among the United States and the public land states. Without certiorari review by this Court, public land states will be deprived of such rights by virtue of an erroneous interpretation of *Andrus.*

ARGUMENT

1. The Colorado Supreme Court misapplied the *Andrus* decision by concluding that equitable title did not vest in Colorado upon the proper filing of its indemnity selection.

A. *Andrus* determined that, under the Taylor Grazing Act, selected lands must be classified as proper for acquisition; it did not hold that equitable title no longer vests upon selection.

In the 5-4 decision in *Andrus,* this Court held that Sections 1 and 7 of the Taylor Grazing Act, 43 U.S.C. §§ 315, 315f, permit the Secretary of the Interior, in his discretion, to classify public lands as proper for acquisition through indemnity selection. 446 U.S. at 520. In exercising such discretion, *Andrus* held that the Secretary of the Interior may refuse to accept an indemnity selection when there is a gross disparity between the value of the original grant and the selected indemnity land. 446 U.S. at 501. *Andrus* made it clear that selecting states do not have an absolute right to select tracts of land of an equal acreage to the original grant. But *Andrus* did not overturn the long-standing principle that equitable title vests immediately upon the proper filing of an indemnity selection, as was announced by this Court in *Payne* and *Wyoming.* The vesting of equitable title is an element of the long-standing, bilateral compact among the United States and the public land states, and is the quid pro quo for the states' waiver of their rights to the original grant lands when making a selection.

Andrus is consistent with the precedent of *Payne* and *Wyoming* regarding the vesting of title. In *Payne,* Secretary of the Interior Payne contended that, because the selections were

subject to his approval, "no right can become vested, nor equitable title be acquired, . . . unless and until his approval is had." This Court rejected that contention on the ground that, once a selection has been made, the Secretary's "duty" is that necessary " 'to determine the lawfulness of the selection as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections'." 255 U.S. at 371. Similarly, in *Wyoming,* this Court reviewed an indemnity land selection made by Wyoming "under the direction of the Secretary of the Interior" and concluded that the power confided to the Secretary was "not that of granting or denying a privilege to the state, but of determining whether an existing privilege conferred by Congress had been lawfully exercised . . . ." 255 U.S. at 494, 496-97. This Court further concluded that a properly filed selection is the equivalent of a cash entry of the selected land and conveys equitable title, subject to the approval of the Secretary of the Interior as above described. Such title vested immediately, notwithstanding the fact that the Secretary might subsequently reject the selection. Legal title did not vest until the Secretary approved the selection. Though subject to the Secretary's review, the Secretary may not defeat a selection by arbitrarily withholding approval, nor may he do so through a mistake of law which would otherwise leave the selector "remediless." *Wyoming,* 255 U.S. at 505. In *Wyoming* and *Payne,* equitable title had vested upon selection and this Court set aside erroneous legal conclusions of the Secretary so that legal title to the selected lands would pass to Wyoming and New Mexico, respectively.

In *Andrus,* this Court was called upon to determine whether the Secretary of the Interior could reject certain indemnity selections because the selected lands had not been classified as proper for acquisition by the States. Utah did not bring the *Andrus* litigation to confirm its equitable title to the selected land; the action was brought to compel the Secretary to approve the selections so that legal title would pass to Utah. However, the Secretary refused to approve the selections because of a gross disparity between the values of the selected and grant lands. The Secretary's refusal to approve the selections was upheld, and legal title did not pass to Utah.

B. The Colorado Court erroneously assumed that equitable title did not vest when Colorado made its indemnity selection because of the possibility that Colorado's selection subsequently might be rejected.

The Colorado Supreme Court improperly broadened this Court's ruling in *Andrus* by assuming that, because the Secretary was entitled to classify lands as being proper for acquisition through selection, no rights in these selected lands vest "until" classification. Said the Colorado Supreme Court in this case: "Until that decision [land classification] has been made, the state has only an incipient prospect of future ownership of the selected lands . . . . " 692 P.2d at 324, 325. But this conclusion misinterprets *Andrus.* The effect of the Colorado decision is to elevate the Secretary's discretionary authority above the Congressional grant of indemnity rights given at statehood. Under the Colorado Court's interpretation of *Andrus,* the Secretary's exercise of discretion *is* the grant of rights to Colorado. That interpretation is inconsistent with the decisions of this Court in *Payne, Wyoming* and *Andrus,* which state that the Secretary does not grant rights, but rather determines whether the rights granted by Congress have been lawfully exercised. In each of those three cases: (i) equitable title had vested in the selecting state; and, (ii) the Secretary had refused to approve the selection, thereby preventing legal title from passing to the state. In *Payne* and *Wyoming,* this Court determined that the Secretary erred as a matter of law in withholding legal title. In *Andrus,* this Court upheld the Secretary's decision, so that legal title to the selected lands was denied, and the equitable title which had vested was defeated. The error of the Colorado Supreme Court was to erroneously extend *Andrus* by assuming that, because equitable title might be subsequently defeated, such title did not vest in the first instance when the selection was filed.

The prompt vesting of equitable title in selected lands upon selection is neither inconsistent with this Court's decision in *Andrus* nor the rights of the United States. Indemnity selections by the public land states have always been subject to the possi-

bility of defeasance in the event that the right was not properly exercised. Selections might be defeated because the selected lands may have been subject to prior commitments or claims, the selected lands may have been determined to be mineral (prior to 1958), or where the value of the selected lands greatly exceeds the value of the base lands, as in *Andrus*. Nevertheless, the possibility of subsequent defeasance has not previously, nor should it now, serve to block the vesting of equitable title upon selection.[12]

Equitable title vests upon selection because the Congressional proposal requires the payment of the purchase price for the selected lands *upon selection* — such payment is effected by the waiver and relinquishment of the state's rights in the original grant. Although the details of the indemnification process have been modified numerous times in the last century, the requirement that the selecting state relinquish its rights to the lands granted simultaneously with filing the selection has remained unchanged. Consequently, the doctrine of equitable title in selected lands, first announced in *Payne* and *Wyoming*, also remains unchanged and continues to be part of the bilateral compact providing for indemnification. The Secretary's authority under the Taylor Grazing Act to reject the selection by determining that the selected lands were not proper for selection does not serve to nullify the grant, nor does it serve to block the vesting of equitable title. The Colorado Supreme Court has distorted this Court's holding in *Andrus* and misapplied such decision by concluding that, prior to a classification decision by the Secretary, a selection is no more than a mere proposal.

C. The Colorado Court's holding is inconsistent with the existence of the solemn indemnity agreement recognized in *Andrus*.

This Court has confirmed the existence of a contract among the United States and the public land states providing for

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[12] The vesting of equitable title is fully consistent with the long-established doctrine of equitable conversion.

indemnity in instances where school lands had been sold or otherwise disposed of by the United States. The right to select indemnity lands was determined to be a "privilege conferred by Congress,"[13] granted so as to insure that the public land states did, in fact, receive a random cross section of the public lands within the state.

The existence of this solemn indemnity agreement was most recently restated in this Court's decision in *Andrus,* wherein it was held that:

> [T]he school land grant was a "solemn agreement" which in some ways may be analogized to a contract between private parties. The United States agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry.
>
> The State's *right* to select indemnity lands may be viewed as the remedy stipulated by the parties for the Federal Government's failure to perform entirely its promise to grant the specific numbered sections.

446 U.S. 508, 509 (emphasis added).

The Colorado Supreme Court's interpretation of this passage distorts it and is entirely unwarranted. The Colorado Court's decision that equitable title does not vest upon selection wholly ignores the existence of the solemn indemnity agreement described in *Payne* and *Wyoming* and confirmed in *Andrus*. The Colorado Supreme Court misapprehends the holding of *Andrus* and conflicts with this Court's confirmation that a selection is the exercise of a "right" under a solemn agreement with the United States. 446 U.S. at 506.

That the indemnification grant is part of a solemn compact is confirmed by Instructional Memorandum No. 82-33 promulgated by the Department of the Interior, Bureau of Land

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[13] *Wyoming,* 255 U.S. at 496.

Management in response to the *Andrus* decision. Such memorandum demonstrates that the Bureau of Land Management understands that the indemnity entitlement is "an obligation and debt due the States by the Federal Government," that the satisfaction of such obligation should be "considered as serving the national interest," and that selections should be processed to the greatest extent possible giving consideration to the equities of the public land states. (See pages 1 and 2 of Bureau of Land Management Instructional Memorandum No. 82-33, Appendix G.)

D. The Utah Supreme Court also erroneously broadened this Court's holding in *Andrus*.

The misapplication of *Andrus* is not limited to Colorado. The Supreme Court of Utah in *Justheim v. Division of State Lands*, 659 P.2d. 1075 (Utah 1983) (*"Justheim"*), also relying substantially on this Court's decision in *Andrus*, upheld a trial court decision determining that, notwithstanding Utah's filing of selection documents, "the State of Utah has not yet acquired *any* property interest by virtue of the pending school indemnity selection applications . . . ." 659 P.2d at 1077 (emphasis added). The Colorado Supreme Court relied upon *Justheim* in its decision in this action. 692 P.2d at 325. Thus, the highest courts of both Colorado (in this case) and Utah (in *Justheim*) have erroneously concluded that, contrary to this Court's prior decisions, public land states no longer receive equitable title to selected lands when a selection is made.

E. The *Andrus* holding may not be mechanically applied to Colorado's selection because there are substantial factual distinctions.

This Court's holding in *Andrus* regarding grossly disparate values between the granted and selected lands should not have been mechanically applied by the Colorado Supreme Court to this case. There are important distinctions between the Utah selection described in *Andrus* and the Colorado selection currently awaiting the Secretary's approval. The Secretary of the

Interior *has not* rejected Colorado's selection, nor has it been determined that the value of Colorado's selection greatly exceeds the value of the lands originally granted. Colorado's selection is substantially smaller than the multiple selections at issue in *Andrus*. The oil shale lands selected by Colorado are not presently leased by the Department of the Interior, unlike the circumstances in *Andrus* where the federal government leased some of the selected lands and deposited over $48,000,000 of lease payments in the District Court. Moreover, Utah generally received a random cross section of the public lands within that State, including oil shale lands. Colorado, however, received no oil shale land in the original grant because a vast part of western Colorado was occupied by the subsequently extinguished Ute Indian Reservation.

2. This Court should review state court decisions, such as this, which are based upon substantial misinterpretations of federal law.

Both the Supreme Courts of Colorado (in this case) and Utah (in *Justheim*) have based their decisions that selecting states no longer obtain equitable title on their understanding that *Andrus* compelled such a conclusion. It is well established that this Court has the jurisdiction and authority to review state court interpretations of state laws which have been reached under erroneous interpretations of federal law. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 104 S. Ct. 2267 (1984), and cases cited therein. The Court should grant certiorari in this case so that the judgment below may be vacated, permitting questions of state law to be reconsidered free from the misunderstandings as to the nature of the indemnity rights provided by Congress.

This Court has already recognized the importance of this issue, noting that school land indemnification is "a significant issue regarding the disposition of vast amounts of public lands . . ." *Andrus*, 446 U.S. at 506. Consequently, in *Andrus*, this Court granted certiorari in order to clarify the rights of the parties to the indemnification agreement. However, the granting

of certiorari and subsequent review by this Court in *Andrus* is now frustrated by the misapplication of that decision by the Supreme Courts of Colorado and Utah. As the federal indemnity statutes have not been clarified or modified subsequent to *Andrus*, this substantial and important federal issue remains to be clarified by this Court.

3. Without certiorari review by this Court, public land states will be deprived of their rights under the indemnity agreement with the United States because of a false interpretation of *Andrus*.

The misapplication of this Court's decision in *Andrus* has had, and continues to have, grave consequences for public land states seeking indemnification. Although most of the indemnity lands originally due to the states have already been selected, the states judiciously select lands of high value and importance as they exhaust their indemnity entitlement. Therefore, contemporary selections may involve mineral lands of significant value, or undeveloped lands with high potential for urban development. Yet, based on a misapprehension of this Court's decision in *Andrus*, these public land states now enter into indemnity negotiations with the Secretary of the Interior with the erroneous understanding that their selections are mere proposals, rather than a privilege and entitlement intended by Congress. The effect is to nullify the Congressional grant of indemnity. The uncertainty of public land states as to their rights post-*Andrus* was demonstrated in this case when the Colorado Attorney General stipulated to the possession of equitable title, briefed the Colorado Supreme Court that "the state acquired an equitable interest in the land upon its selection,"[14] but backed away from the stipulation during oral argument, based upon the Attorney General's rereading of *Andrus*.

The rights which are diminished are not merely the rights of the public land states, or the state agencies which oversee the

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[14] Respondents' "Opening Brief" to the Colorado Supreme Court filed February 28, 1983, at page 7.

state school lands. The beneficiaries of the school land and indemnification grants are the citizens of the public land states, who benefit from the sale, lease or other disposition of the state school lands. And it is these citizens who are injured by the misunderstanding of *Andrus* given by state agencies or attorneys general, and by the misapplication of *Andrus* by the courts of the public land states.

Six public land states have yet to exhaust their indemnity entitlement.[15] The map on page 17 identifies the states which have not yet completed their indemnity selections. Tens of thousands of acres have yet to be selected. At the time of filing this petition, there are several selections before the Secretary of the Interior for approval. This process should not be permitted to proceed further without clarification as to the nature of the contract rights of these states, and confirmation that equitable title to selected lands vests upon compliance with 43 U.S.C. §§ 851, 852 (1982). The guidance of this Court is needed to protect the rights of the public land states, and to ensure that this Court's decision in *Andrus* is logically applied and placed in the proper context of prior precedent.

Although this petition is filed on behalf of a private company, it involves the rights of all states which joined the Union after 1802. The compacts made between these states and the United States government have been abrogated by a misinterpretation of this honorable Court's decision so as to deprive the states of their rights. Thus, a profound public policy preserving the valuable rights granted to the states is involved in the instant petition.

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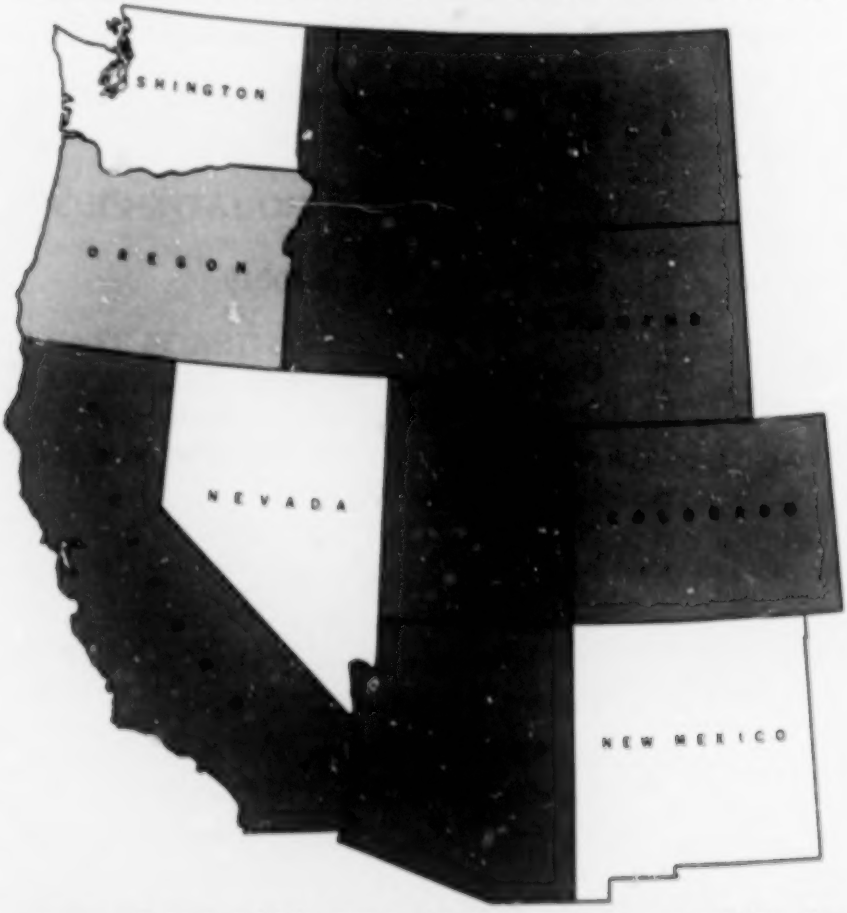
[15] Arizona, California, Colorado, Idaho, Montana and Wyoming.

PUBLIC LAND STATES:
CURRENT STATUS OF INDEMNITY SELECTIONS



States which currently have acreage available for indemnity selection: Arizona, California, Colorado, Idaho, Montana and Wyoming.

Oregon and the United States are currently involved in a dispute regarding whether Oregon has "overdrawn" its indemnity acreage or whether it is entitled to select additional lands.

An application covering virtually all of Utah's indemnity acreage entitlement is currently pending; following completion of that selection, it is possible that Utah may still have some indemnity acreage available for selection.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Colorado Supreme Court.

Phillips, Nizer, Benjamin, Krim & Ballon

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Counsel for Petitioner
Occidental Oil Shale, Inc.

April 15, 1985

APPENDIX A

IN THE SUPREME COURT, STATE OF COLORADO
CASE NO. 82SA455

December 10, 1984
Rehearing Denied January 14, 1985

OCCIDENTAL OIL SHALE, INC.,
Plaintiff-Appellee,

v.

STATE BOARD OF LAND
COMMISSIONERS OF COLORADO;
and its members, ROWENA ROGERS,
WILLIAM H. CLAIRE and TOMMY NEAL,
Defendants-Appellants.

Appeal from the District Court, City and County of Denver
Hon. Robert T. Kingsley, Judge

EN BANC JUDGMENT REVERSED AND CAUSE REMANDED

Daniel R. Hale
Grand Junction, Colorado

Davis, Graham & Stubbs
Robert H. Harry
Joseph P. McMahon, Jr.
Denver, Colorado

Attorneys for Plaintiff-Appellee

Duane Woodard, Attorney General
Charles B. Howe, Deputy Attorney General
Richard H. Forman, Solicitor General
Melinda Kassen, Assistant Attorney General
Janet L. Miller, Deputy Attorney General
Denver, Colorado

Attorneys for Defendants-Appellants

JUSTICE LOHR delivered the Opinion of the Court.

The District Court for the City and County of Denver set aside a decision of the State Board of Land Commissioners (board) denying an application by Occidental Oil Shale, Inc. (Occidental) for a permit to explore the extent of an alleged discovery of oil shale deposits on certain lands. The district court disagreed with the board's conclusion that the lands in question were not "lands belonging to the state" under section 36-1-140, 15 C.R.S. (1973), and thus were not subject to the exploration permit provisions of the statute.[1] The board appealed from the district court's judgment.[2] We agree with the board that the lands do not belong to the state within the meaning of section 36-1-140. Therefore, we reverse the judgment of the district court and remand the case to that court with directions that it reinstate the board's decision.

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1 The version of section 36-1-140, 15 C.R.S. (1973), in effect at the time of Occidental's application provided:

> Location of mineral claims may be made upon unleased mineral lands belonging to the state. The discoverer of a body of mineral in either a lead, lode, ledge, deposit, vein, or contact shall immediately post conspicuously a notice declaring that he has made such a discovery on the date attached to the notice. Within ten days after posting said notice, the discoverer must notify the state board of land commissioners of said discovery and arrange for a permit to explore the extent of the discovery. Within sixty days from the date of discovery, the locator shall be required to take a lease upon such terms as may be agreed upon by the state board of land commissioners, or apply for an extension of the permit.

In its present form, this statute expressly excludes coal and oil shale claims from its terms. § 36-1-140, 15 C.R.S. (1984 Supp.).

2 The board appealed the judgment of the district court to the Colorado Court of Appeals. We accepted jurisdiction pursuant to section 13-4-110(1)(a), 6 C.R.S. (1973), because of a possible issue concerning the constitutionality of section 36-1-140, 15 C.R.S. (1973). More precisely, Occidental filed a motion to transfer this matter from the court of appeals to this court on the grounds that the board argued below, and might argue on appeal, that the construction of section 36-1-140 adopted by the district court conflicts with the board's constitutional duty to maximize revenue in its management of the state's land. Colo. Const. art. IX § 10. Jurisdiction to determine cases in which the constitutionality of a statute is in question is withheld from the court of appeals by section 13-4-102(1)(b), 6 C.R.S. (1973). The basis on which we resolve this appeal obviates the need to address the constitutional issue.

I.

Sections 16 and 36 in every township were granted to Colorado by the United States Congress for the support of common schools by section 7 of the Colorado Enabling Act.[3] Section 7 also provided that, where such sections had been sold or otherwise disposed of by an act of Congress, the state should receive "other lands equivalent thereto." Congress also enacted certain statutes of general applicability providing the mechanism by which the states could select indemnity lands in lieu of any original school grant lands that had been disposed of or otherwise proved unavailable for any of a number of reasons detailed in the statutes. These statutes are codified in their present form at 43 U.S.C. §§ 851-852 (1982).

Federal lands containing known mineral resources could not be selected by the states as indemnity lands prior to 1958. In that year, Congress extended the indemnity grant to include the right to select mineral lands to the extent the indemnification was sought for lost mineral lands. Pub.L. No. 85-771, § 2, 72 Stat. 928, 928 (1958).

On September 4, 1979, the board, acting on behalf of the State of Colorado,[4] submitted a list to the Bureau of Land Management, United States Department of the Interior, selecting 6,840 acres of oil shale lands in Rio Blanco County in lieu of certain designated school lands that had proved unavailable for disposition by the United States. *See* § 7, Colorado Enabling Act.

On September 24, 1979, Occidental notified the board that Occidental had discovered oil shale on the selected lands and that it had located mineral claims on all of those lands based on that discovery. Pursuant to section 36-1-140, Occidental requested a permit from the board to explore the extent of the discovery and stated to the board that Occidental "stands ready to take a lease

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[3] The Colorado Enabling Act was passed by Congress on March 3, 1875. 18 Stat. 474.

[4] The State Board of Land Commissioners asserts authority to select indemnity lands on behalf of the State of Colorado pursuant to article IX, section 10 of the Colorado Constitution and section 36-1-205, 15 C.R.S. (1973).

or apply for an extension of the above requested permit to further explore such lands."

On October 15, 1979, the board denied Occidental's application for an exploration permit. The board concluded that the lands in question would not belong to the state for the purposes of a mineral claim location pursuant to section 36-1-140 until the Secretary of the Interior approved the state's selection and legal titie passed to the state.[5]

Occidental brought an action in the district court for judicial review of the board's denial pursuant to section 24-4-106, 10 C.R.S. (1982). The district court set aside the board's decision to deny Occidental an exploration permit. The court concluded that, by identification and selection of indemnity lands in documents submitted to the Bureau of Land Management, Colorado acquired a sufficient interest in the selected lands so that these properties constituted "lands belonging to the state" upon which valid mineral claims could be located pursuant to section 36-1-140. The matter was remanded by the district court to the board for further proceedings on Occidental's application. The board then brought this appeal.

II.

When Occidental submitted its application for an exploration permit, section 36-1-140 provided that "location of mineral claims may be made upon unleased mineral lands belonging to the state." We conclude that the selected lands were not "lands belonging to the state" at the time Occidental made its alleged discovery.

Occidental relies on *Wyoming v. United States,* 255 U.S. 489, 41 S. Ct. 393, 65 L. Ed. 742 (1921), for its contention that an equitable interest in the selected lands passed to the state at the moment of selection. In that case, the United States Supreme Court reviewed the nature of the federal/state relationship following the selection of certain indemnity lands by Wyoming. The court concluded:

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5 At the time the board considered Occidental's request, the Secretary of the Interior had taken no action concerning the state's selection of the indemnity lands.

> It is not as if the selection was merely a proposal by the State which the [federal] land officers could accept or reject. They had no such option to exercise, but were charged with the duty of ascertaining whether the State's waiver and selection met the requirements of the congressional proposal and of giving or withholding their approval accordingly. The power confided to them was not that of granting or denying a privilege to the State, but of determining whether an existing privilege conferred by Congress had been lawfully exercised; — in other words, their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the State in 1912. If these were valid then — if they met all the requirements of the congressional proposal, including the directions given by the Secretary — they remain valid notwithstanding the subsequent change in conditions. Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract . . . .

255 U.S. at 496-97, 41 S. Ct. at 394-95. *Accord Payne v. New Mexico,* 255 U.S. 367, 41 S. Ct. 333 65 L. Ed. 680 (1921). Occidental asserts that, since section 2-4-401(5), 1B C.R.S. (1980), provides that the term "lands" when used in a statute includes "lands, tenements, and hereditaments, and all rights thereto and all interests therein," the state's equitable interest in the selected lands qualifies these properties as "lands belonging to the state" for the purposes of section 36-1-140. Therefore, according to Occidental, it could locate mineral claims upon the selected lands pursuant to section 36-1-140 and is entitled to an exploration permit.

In *Andrus v. Utah,* 446 U.S. 500, 100 S. Ct. 1803, 64 L. Ed. 2d 458 (1980), however, the United States Supreme Court concluded that the nature of the federal government's role in the approval of a state's selection of indemnity lands was altered by a combination of congressional legislation and executive withdrawals of federal lands from disposal after *Wyoming v. United States*

was decided. In *Andrus,* the Supreme Court held that he Secretary of the Interior now has broad discretion to decide whether to classify lands as available for indemnity selections by the states. 446 U.S. at 519-20. To reach this conclusion, the court relied on the powers granted to the Secretary of the Interior in section 7 of the Taylor Grazing Act to classify federal lands for various uses,[6] and on the fact of the withdrawal of all federal lands from disposal, prior to classification, by section 1 of the Taylor Grazing Act[7] and subsequent executive orders of the president. 446 U.S. at 511-20, 100 S.Ct. at 1809-13.

The foundation in *Wyoming v. United States* for the conclusion that the state has an equitable interest in selected lands has been undermined by the subsequent legislation and executive action described in *Andrus.* The function of the Secretary of the Interior upon selection is no longer entirely "judicial in its nature," 255 U.S. at 497, 41 S. Ct. at 395, and is no longer restricted to "determining whether an existing privilege conferred by Congress had been lawfully exercised," 255 U.S. at 496, 41 S. Ct. at 394. Rather , the Secretary of the Interior now has broad but as yet

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6 The Taylor Grazing Act was passed by Congress in 1934. 48 Stat. 1269. Section 7 of the Taylor Grazing Act, as amended in 1936, provides in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this subchapter or proper for acquisition in satisfaction of any outstanding lieu, exchange or script [sic] rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws . . . . Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry . . . . 43 U.S.C. § 315f (1982).

7 Section 1 of the Taylor Grazing Act is codified, as amended, as 43 U.S.C. § 315 (1982).

incompletely-defined discretion[8] to withhold federal lands from classification as lands available for indemnity selection by the states. Even assuming that a state's selection of land satisfies all of the criteria for a proper selection of indemnity lands as detailed in 43 U.S.C. §§ 851-852, the Secretary of the Interior in the proper exercise of his discretion can withhold the lands from classification as indemnity lands and deny the selection. *See Andrus v. Utah,* 446 U.S. at 520, 100 S. Ct. at 1813. Therefore, contrary to the situation existing at the time *Wyoming v. United States* was decided, a state now obtains no assurance that it will receive all or any selected indemnity lands until the Secretary of the Interior makes the discretionary classification decision. Until that decision has been made, the state has only an incipient prospect of future ownership of the selected lands, and these properties cannot be considered "lands belonging to the state" within the meaning of section 36-1-140. *See Justheim v. Division of State Lands,* 659 P.2d 1075 (Utah 1983).

In summary, we hold that the lands in question did not belong to the state upon selection and that Occidental could not locate mineral claims on these lands pursuant to section 36-1-140 for this reason. Thus, the board's decision to deny Occidental an exploration permit was proper.

We reverse the judgment of the district court and remand this case to that court with directions to reinstate the board's order denying the exploration permit.

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[8] In *Andrus,* the United States Supreme Court held that it was not an abuse of that discretion for the Secretary to find that indemnity lands selected by Utah were grossly disparate in value, though equal in acreage, to the original school lands granted and to refuse to classify these lands for selection for this reason. The court intimated, however, that the Secretary's discretion is not limited to value comparisons, stating:

> We therefore hold that the 1936 amendment to the Taylor Grazing Act conferred on the Secretary the authority in his discretion to classify lands within a federal grazing district as proper for school indemnity selection. And we find no merit in the argument that the Secretary's "grossly disparate value" policy consitutes an abuse of the broad discretion thus conferred.

446 U.S. at 520, 100 S. Ct. at 1813. The boundaries of that discretion remain unexplicated.

APPENDIX B

IN THE SUPREME COURT STATE OF COLORADO
82SA455

OCCIDENTAL OIL SHALE, INC.,	)	
Plaintiff-Appellee,	)	
v.	)	
STATE BOARD OF LAND COMMISSIONERS OF COLORADO; and ITS MEMBERS, ROWENA ROGERS, WILLIAM H. CLAIRE, and TOMMY NEAL,	)	Appeal from the District Court, City & County of Denver Trial Court No. 79CV7891
Defendants-Appellants.	)	

Upon consideration of the Petition for Rehearing filed by the Plaintiff-Appellee in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition be, and the same hereby is DENIED.

BY THE COURT, EN BANC, JANUARY 14, 1985.

By: /s/ H. GANTZ
Deputy Clerk

APPENDIX C

DISTRICT COURT, COUNTY OF DENVER,
STATE OF COLORADO

Case No. 79CV7891, Courtroom 7
[Signed May 14, 1982]

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

OCCIDENTAL OIL SHALE, INC.,

Plaintiff,

v.

STATE BOARD OF LAND
COMMISSIONERS OF COLORADO
and its members ROWENA ROGERS,
WILLIAM H. CLAIRE, and TOMMY NEAL,

Defendants.

The above-entitled matter having come on for hearing before this Court on April 15, 1982, and the Court having heard the argument of counsel, examined the administrative record, reviewed the briefs submitted by counsel and the authorities relied upon by the parties, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is an action by the Plaintiff, Occidental Oil Shale, Inc., ("Occidental") for review of a decision by the State Board of Land Commissioners ("Board") denying Occidental's request for a permit to explore certain mineral lands in Rio Blanco County, Colorado.

2. At all relevant times, Colo. Rev. Stat. § 36-1-140 (1973) provided that mineral claims, including claims for oil shale, could be located "upon unleased mineral lands belonging

to the state." Upon satisfaction of certain notice and notification requirements, this statute also provided that a mineral locator could arrange for a permit to explore his mining claims and, thereafter to lease such claims from the Board.

3. In 1980, subsequent to the commencement of this action, Colo. Rev. Stat. § 36-1-140 was amended, providing that such section would thereafter apply to mineral claims other than claims for coal and oil shale.

4. In 1861, the Legislative Assembly of the Territory of Colorado enacted a statute which stated, inter alia, that the term "lands," as used in Colorado statutes, was to be construed to include "lands, tenements, hereditaments, and all rights thereto, and all interests therein." This law was incorporated in the General Laws of the State of Colorado by the First Colorado General Assembly in 1876 and has continuously remained the law in Colorado to this date.

5. On September 4, 1979, the Board, on behalf of the State of Colorado, submitted to the United States Department of Interior, Bureau of Land Management documents identifying 6,840 acres of oil shale lands selected by Colorado ("Selected Lands") as indemnity for certain lands granted to Colorado upon statehood but not received thereby because of deficiencies, claims, reservations, or other disposals by the United States. This selection of indemnity lands by the Board was made pursuant to Art. IX, Section 10 of the Colorado Constitution and 43 U.S.C. § 851, 852.

6. Pursuant to Colo. Rev. Stat. § 36-1-140 (1973), Occidental notified the Board by letter dated September 24, 1979, that Occidental had made a discovery of oil shale and associated minerals after the State's September 4, 1979, selection and had located mineral claims on the Selected Lands pursuant to Colo. Rev. Stat. § 36-1-140 (1973). Occidental included copies of the mining location certificates and requested from the Board a permit to explore the mining claims.

7. Occidental representatives appeared and testified at two Board meetings held, in part, to consider Occidental's request for an exploration permit. These hearings were held on October

1, and October 15, 1979, and the proceedings were set forth in transcripts which were included in the Administrative record. At these hearings, Occidental again requested an exploration permit.

8. At the conclusion of the Board's second meeting on October 15, 1979, the Board voted to deny Occidental's request for an exploration permit on the grounds that the State of Colorado did not yet have legal title to the Selected Lands.

9. Occidental timely sought review of the Board's decision by filing this action on November 9, 1979, pursuant to the State Administrative Procedure Act. Thereafter, the parties stipulated, with Court approval, that they would initially seek a determination of whether mineral locations could be made pursuant to Colo. Rev. Stat. § 36-1-140 (1973), on the Selected Lands.

10. The parties further stipulated that, upon the filing of the selection application by the Board, there was vested in the State the full equitable title to and interest in the selected lands, and that legal title to the lands selected would not vest in the State until the lands were clear listed by the Secretary of Interior.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action under Colo. Rev. Stat. § 24-4-106 (1980 Cum. Supp.).

2. When the Board submitted to the Bureau of Land Management documents identifying and selecting the Selected Lands, the State of Colorado acquired equitable title to and interest in the Selected Lands. Legal title to the Selected Lands does not vest in Colorado until approval of the selection by the Secretary of Interior. *Wyoming v. United States,* 255 U.S. 489 (1921); *Payne v. New Mexico,* 225 U.S. 367 (1921).

3. Colo. Rev. Stat. § 36-1-140 was enacted to promote mineral development and permits mineral locations to be made on "lands belonging to the State." Under Colo. Rev. Stat. § 2-4-401(5) the term "lands," as used in § 36-1-140, includes all rights to and all interests in land.

4. As Colorado acquired equitable title to and interest in the Selected Lands upon selection, the Selected Lands were

thereafter "lands belonging to the State," and, therefore, subject to mineral location pursuant to Colo. Rev. Stat. § 36-1-140 (1973).

5. Even without the definition supplied by Colo. Rev. Stat. § 2-4-401(5), Colorado had acquired such an interest in the Selected Lands so as to open such lands to mineral claim locations under Colo. Rev. Stat. § 36-1-140. *See Wyoming v. United States, supra.*

6. The Board erred in denying Occidental's request for an exploration permit on the grounds that the lands did not belong to the State.

JUDGMENT

7. The Board's October 15, 1979, decision to deny Occidental an exploration permit was unlawful and is hereby set aside. This case is remanded to the Board for further proceedings consistent with this decision.

8. This Judgment is limited to the determination that the Selected Lands were open to location pursuant to Colo. Rev. Stat. § 36-1-140 (1973), after selection and at the time that Occidental notified the Board of its locations. All other claims set forth in Occidental's complaint herein are dismissed without prejudice, and may be renewed, if necessary, at a later date.

9. The clerk is directed to promptly enter this judgment pursuant to Rule 58, Colo. R. Civ. P.

DATED this 14th day of May, 1982.

BY THE COURT

By: /s/ ROBERT T. KINGSLEY
District Judge

APPENDIX D

DISTRICT COURT, COUNTY OF DENVER,
STATE OF COLORADO
Case No. 79CV7891, Courtroom 7
[Signed September 14, 1981]

ORDER

OCCIDENTAL OIL SHALE, INC.,

Plaintiff,

v.

STATE BOARD OF LAND COMMISSIONERS OF COLORADO and its members ROWENA ROGERS, WILLIAM H. CLAIRE, and TOMMY NEAL,

Defendants.

THIS MATTER having come before the Honorable Robert T. Kingsley on August 12, 1981, at 9:15 a.m., on Defendants' Motion to Commence Briefing Schedule, filed October 22, 1980, and Plaintiff's Motion to Stay Proceedings, filed November 21, 1980, Plaintiff represented by Daniel R. Hale and Davis, Graham & Stubbs, by David L. Hiller, and Defendants by Assistant Attorneys General Janet L. Miller and Kathleen Bowers, the parties having withdrawn their respective motions, without prejudice, the Court having noted that, by Order of June 24, 1980, this Court, by the Honorable Leonard P. Plank, determined that it will proceed in this action to first decide the issue of whether the subject lands are "lands belonging to" the State under 1973 C.R.S. 36-1-140, and the Court having heard the statements of counsel and being fully advised in the premises,

IT IS ORDERED that:

1. The Court will decide whether the subject lands belong to the State under 1973 C.R.S. 36-1-140 on the basis of the following facts:

A. Upon the filing of the State Board of Land Commissioners' selection application with the Bureau of Land Management on September 4, 1979, there was vested in the State the full equitable title to and interest in the lands selected.

B. Legal title to the lands selected will not vest in the State until the lands are clear-listed by the Secretary of the Interior.

2. The issue now before the Court is therefore whether the absence of legal title alone is determinative of whether the subject lands are "lands belonging to" the State under 1973 C.R.S. 36-1-140.

3. The parties will attempt to resolve the pending questions regarding discovery in this matter, and will inform the Court of their progress on these questions on or before September 18, 1981.

4. The parties will attempt to agree on a briefing schedule in this matter and will report that schedule to the Court on or before September 18, 1981.

DATED AT DENVER, COLORADO this 14th day of September, 1981.

BY THE COURT:

By: /s/ ROBERT T. KINGSLEY
District Judge

The entry of the foregoing
Order is consented to:

DAVIS, GRAHAM & STUBBS

By: /s/ DAVID L. HILLER
#10119
P.O. Box 185
Denver, Colorado 80201
Telephone: (303) 892-9400

Attorneys for Plaintiff

By: /s/ JANET L. MILLER
#5843
Assistant Attorney General
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: (303) 839-3611

Attorney for Defendants

APPENDIX E

Commissioners
ROWENA ROGERS
WM. H. CLAIRE
TOMMY NEAL

ANTHONY SABATINI
Administrator
THOMAS E. BAETZ
Minerals Director
ROBERT L. HAPGOOD
Chief Accountant

BOARD OF LAND COMMISSIONERS
Department of Natural Resources
620 Centennial Building
1313 Sherman St., Denver, Coloraodo 80203
(303) 839-3454

October 16, 1979

Occidental Oil Shale, Inc.
5000 Stockdale Highway
Bakersfield, CA 93300

Gentlemen:

On October 15, 1979, representatives of Occidental Oil Shale, Inc. appeared before the State Board of Land Commissioners to request an exploration permit on the 6,840 acres in Rio Blanco County which the Land Board has selected as indemnity acreage.

The advice of the Attorney General to the Land Board is that it does not have full legal title to the property and cannot issue permits or otherwise assume any management responsibility in regard to the selection site.

By formal action the Land Board took unanimous action to affirm a motion to deny Occidental's request for a permit under CRS 36-1-140.

Very sincerely yours,

STATE BOARD OF LAND COMMISSIONERS

Rowena Rogers
President

Commissioners
ROWENA ROGERS
WM. H. CLAIRE
TOMMY NEAL

ANTHONY SABATINI
Administrator
THOMAS E. BAETZ
Minerals Director
ROBERT L. HAPGOOD
Chief Accountant

BOARD OF LAND COMMISSIONERS
Department of Natural Resources
620 Centennial Building
1313 Sherman St., Denver, Colorado 80203
(303) 839-3454

October 22, 1979

Mr. R. J. Fernandes, President
Occidental Oil Shale, Inc.
5000 Stockdale Highway
Bakersfield, CA 93309

Dear Mr. Fernandes:

OCCIDENTAL OIL SHALE CLAIM

The Colorado State Board of Land Commissioners has received your "renewed request" for an exclusive permit to explore certain lands on which the Land Board has recently filed its selection list with the Department of Interior, Bureau of Land Management. According to your letter dated October 17, 1979, this "renewed request" is based on "Additional and Amended Certificates and Relocation Certificates" which allegedly confirm discovery on the subject land.

On October 15, 1979, the Land Board considered and denied Occidental's request for a permit. Prior to this decision, the Board was advised by Occidental that it had made a discovery of oil shale on the land in question. Thus, all relevant information which is contained in Occidental's "renewed request" was before the Board when Occidental's request for a permit was denied.

As you are aware, the Board denied Occidental's request for a permit since the subject land does not "belong" to the state as required by C.R.S. 1973, 36-1-140. Any other issues concerning compliance with this statute were not considered.

In the event that the state becomes owner of the subject land upon approval of its selection list by the Secretary of the Interior, and Occidental files a request for a permit, then the Board will consider the extent of Occidental's compliance with the statute at that time. Until the state is determined to be the owner, the Board lacks authority to act under 36-1-140. For this reason, the permit request, location certificates and claim map submitted by Occidental on September 24, 1979, were returned at the close of the October 15, 1979, meeting.

At the conclusion of this meeting, counsel to the Board, Mrs. Janet M. Clouse, indicated that the Board's action constituted final agency action as that term is used within the Administrative Procedures Act. The Board has no authority whatsoever to reconsider its decision based on information such as that submitted in support of Occidental's "renewed request", which information was presented to the Board before its decision on October 15, 1979.

Accordingly, Occidental's "renewed request" and the "Additional and Amended Certificates and Relocation Certificates" submitted in support thereof are hereby being turned [sic] as well as those documents submitted on September 24, 1979, which were submitted to the Board by your letter of October 17, 1979. The Board took final action on this matter on October 15, 1979.

Sincerely yours,

STATE BOARD OF LAND COMMISSIONERS

Rowena Rogers
President

APPENDIX F

STATUTES INVOLVED:

I. Act of March 3, 1875, § 7, 18 Stat. 474 (the Colorado Enabling Act)

An Act to enable the people of Colorado to form a constitution and state government, and for the admission of the said state into the union on an equal footing with the original states.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled:

* * * * *

§ 7. School lands. The sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of congress, other lands equivalent thereto in legal sub-divisions of not more than one quarter-section, and as contiguous as may be, are hereby granted to said state for the support of common schools.

II. 43 U.S.C. § § 851-852 (1982) (indemnity laws)

§ 851. Deficiencies in grants to State by reason of settlements, etc., on designated sections generally.

Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation,

or are, before title could pass to the State, otherwise disposed of by the United States: *Provided,* That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: Provided, however, That nothing in this section shall prevent any State from awaiting the extinguishment of any such military, Indian or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

§ 852. Selections to supply deficiencies of school lands.

(a) Restrictions.

The lands appropriated by section 851 of this title, shall be selected from any unappropriated, surveyed or unsurveyed public lands within the State where such losses or deficiencies occur subject to the following restrictions:

(1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State; and

(3) Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a producing or producible status, subject, however, to the restrictions and conditions of the preceding and following paragraphs of this subsection.

(4) If a selection is consummated as to a portion but not all of the lands subject to any mineral lease or permit, then, as to such portion and for so long only as such lease or permit or any lease issued pursuant to such permit shall remain in effect, there shall be automatically reserved to the United States the mineral or minerals for which the lease or permit was issued, together with such further rights as may be necessary for the full and complete enjoyment of all rights, privileges and benefits under or with respect to the lease or permit: *Provided, however,* That after approval of the selection the Secretary of the Interior shall determine what portion of any rents and royalties accruing thereafter which may be paid under the lease or permit is properly applicable to that portion of the land subject to the lease or permit selected by the State, the portion applicable being determined by applying to the sum of the rents and royalties the same ratio as that existing between the acreage selected by the State and the total acreage subject to the lease or permit; of the portion applicable to the selected land 90 per centum shall be paid to the State by the United States annually and 10 per centum shall be deposited in the Treasury of the United States as miscellaneous receipts.

(5) If a selection is consummated as to all of the lands subject to any mineral lease or permit or if, where the selecting State has previously acquired title to a portion of the lands subject to a mineral lease or permit, a selection is consummated as to all of the remaining lands subject to that lease or permit, then and upon condition that the United States shall retain all rents and royalties theretofore paid and that the lessee or permittee shall have and may enjoy under and with respect to that lease or permit all the rights, privileges, and benefits which he would have had or might have enjoyed had the selection not been made and approved,

the State shall succeed to all the rights of the United States under the lease or permit as to the mineral or minerals covered thereby, subject, however, to all obligations of the United States under and with respect to that lease or permit.

(b) Adjustments.

Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land: *Provided,* That the States which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

(c) Preference rights for State.

Notwithstanding the provisions of section 282 of this title on the revocation not later than 10 years after the date of approval of this Act, of any order of withdrawal, in whole or in part, the order or notice taking such action shall provide for a period of not less than six months before the date on which it otherwise becomes effective in which the State in which the lands are situated shall have a preferred right of application for selection under this section, subject to the requirements of existing law, except as against the prior existing valid settlement rights and preference rights conferred by existing law other than section 282 of this title, or as against equitable claims subject to allowance and confirmation, and except where a revocation of an order of withdrawal is made in order to assist in a Federal land program.

(d) "Unappropriated public lands" defined; determination of mineral character of land.

(1) The term "unappropriated public lands" as used in this section shall include, without otherwise affecting the meaning thereof, lands withdrawn for coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, oil shale, sodium, and sulfur, but otherwise subject to appropriation, location, selection, entry, or purchase under the nonmineral laws of the United States; lands withdrawn by Executive Order Numbered 5327, of April 15, 1930, if otherwise available for selection; and the retained or reserved interest of the United States in lands which have been disposed of with a reservation to the United States of all minerals or any specified mineral or minerals.

(2) The determination, for the purposes of this section of the mineral character of lands lost to a State shall be made as of the date of application for selection and upon the basis of the best evidence available at that time.

§ 852a. Applications for unsurveyed lands; regulations; acreage requirements.

The Secretary of the Interior may issue regulations governing applications for unsurveyed lands. If he establishes any minimum acreage requirements, they shall provide for selection of tracts of reasonable size, taking into consideration location, terrain, and adjacent land ownership and uses.

§ 852b. Survey of lands prior to transfer; time for survey; availability of funds; lands suitable for transfer.

Prior to issuance of an instrument of transfer, lands must be surveyed. The Secretary of the Interior shall within five years, subject to the availability of funds, survey the exterior boundaries of lands approved as suitable for transfer to the State.

III. 43 U.S.C. § § 315, 315f (1982) (Sections 1 and 7 of the Taylor Grazing Act)

§ 315. Grazing districts; establishment; restrictions; prior rights; rights-of-way; hearing and notice; hunting or fishing rights.

In order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, of vacant, un-

appropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not appropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided,* That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this subchapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this subchapter nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this subchapter, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. Whenever any grazing district is established pursuant to this subchapter, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights. Neither this subchapter nor the Act of December 29, 1916 (39 Stat. 862; U.S.C., title 43, secs. 291 and following), commonly known as the "Stock Raising Homestead Act", shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 471 of title 16, for the purposes set forth in section 475 of title 16, or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established

until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however,* That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. Nothing in this subchapter shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district.

§315f. Homestead entry within district or withdrawn lands; classification; preferences.

The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this subchapter, or proper for acquisition in satisfaction of any outstanding lieu [sic], exchange or scrip rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided,* That locations and entries under the mining laws including the Act of February 25, 1920, as amended [30 U.S.C. 181 et seq.], may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this subchapter. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided,* That upon the application of any applicant qualified to

make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

IV. Colorado Mineral Location Law; Colo. Rev. Stat. § 36-1-140 (1973)

Mineral locations - posting - lease. Location of mineral claims may be made upon unleased mineral lands belonging to the state. The discoverer of a body of mineral in either a lead, lode, ledge, deposit, vein, or contact shall immediately post conspicuously a notice declaring that he has made such a discovery on the date attached to the notice. Within ten days after posting said notice, the discoverer must notify the state board of land commissioners of said discovery and arrange for a permit to explore the extent of the discovery. Within sixty days from date of discovery, the locator shall be required to take a lease upon such terms as may be agreed upon by the state board of land commissioners, or apply for an extension of the permit.

APPENDIX G

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

October 15, 1981

Instruction Memorandum No. 82-33
Expires 9/30/82

To: SD's

From: Director

Subject: State Indemnity Selections

This memorandum establishes procedures for processing State indemnity selection applications, pending issuance of a revised BLM Manual Section 2621. Existing procedures in BLM Manual Section 2621, Release 2-88 of November 13, 1974, are to be used where they are not in conflict or inconsistent with this memorandum.

Prior to initiating implementation of this guidance, you should discuss the operational aspects with your counterpart State Land Commissioner/Director. Based on these discussions, appropriate modifications may be made for your State specific situations. Copies of this memorandum have been sent under separate cover to each State Land Commissioner/Director.

The policy contained herein is derived primarily from U.S. Supreme Court decision *Andrus v. Utah*, _____ U.S. _____ (No. 78-1522, May 19, 1980), and the expressed interest of the Department and the Bureau to conclude the indemnity selection program as expeditiously as possible.

1. The remaining entitlements of the various States are to be considered as an obligation and debt due the States by the Federal Government.

2. In the application of laws, regulations, and policies for indemnity selections, BLM will consider the equities of the States to the greatest extent possible within the constraints of applicable law.

3. Satisfaction of indemnity selection rights and disposal of parcels of land for that purpose are to be considered as "serving the national interest" in the context of Section 102(a)(1) of the Federal Land Policy and Management Act of 1976 (FLPMA) and in connection with land-use planning and classification activities in the indemnity selection implementation program.

4. For purposes of indemnity selection, Bankhead-Jones lands (Land Utilization Lands (LU)) are public lands and are thus eligible for lieu selection, subject to confirmation by issuance of a formal Solicitor's Opinion.

Background

In *Andrus v. Utah,* the Supreme Court held that the discretionary authority of the Secretary, as delegated to BLM under Section 7 of the Taylor Grazing Act, includes the authority to refuse to classify public lands as suitable for selections where values are in excess of established policy guidelines.

The Supreme Court held that the Secretary may take into account the value of base lands and selected lands in the approval or denial of selections. The Court used the phrase "roughly equivalent value" as a general rule to guide value equities.

The Solicitor has determined that under this rule, States may choose to:

(a) Aggregate, or "pool" base lands;
(b) Select on a tract-for-tract basis; or
(c) Use a combination of 1 and 2.

Thus, a State may, in an application(s), satisfy all or any part of its entitlement by selecting public lands of an aggregate value roughly equivalent to that of the State's offered base lands, as long as the total public land acreage selected does not exceed the State's entitlement. In the alternative, a State may continue to select individual tracts or groups of tracts without the constraint of a tract-for-tract match in acreage of the base and selected lands, but must stay within the value differentials discussed below.

The "roughly equivalent value" guideline clearly implies a range of different values. This range has been interpreted by the Solicitor

to suggest that the value of the selected lands cannot exceed that of the pooled base lands by more than 10 percent, provided however, that where base land is offered on a tract-by-tract basis and a base land tract has a value of less than $500.00 per acre, the public land tract selected may not exceed the base land value by more than 25 percent. Where the value is greater than $500.00 per acre, the public land tract selected may not exceed the base land value by more than 10 percent.

Valuation

Valuation on both base lands and selected lands will be made at approximately the same date, and as near to the proposed date of conveyance as practicable.

The basic policy on valuation will be highest and best use as to both base and selected lands. All pertinent information available from any source may be used to assist in the valuation process. The same valuation methodology will be used for value determinations on both base and selected lands. A market data review approach (i.e., comparable sale values) will be used whenever possible. Other methods (e.g., income approach, estimates of reserves, etc.) will be used where they may serve to provide useful information. The value of base lands will not be considered to be adversely affected by any current use restrictions, the policy being highest and best use. In particular, base lands are to be valued on this basis without regard to any constraints arising from uses to which the lands lost to the States have been subsequently placed.

No formal appraisals are required. However, it is the responsibility of the BLM field office to assure that valuations completed within the scope of these guidelines fall within the acceptable margin of differences as defined above.

Mineral in Character

State base lands must be found to be "mineral-in-character" to qualify a State to select public lands which are mineral-in-character. Base lands classified by Geological Survey (GS) as "prospectively valuable" or "valuable" for leasable minerals (i.e., oil shale, oil and gas, geothermal, etc.) will be regarded by the BLM to be mineral-in-character for purposes of State selections. The Bureau

will continue to make determinations as to whether lands are mineral-in-character with respect to hardrock minerals, while mineral-in-character determinations involving leasable minerals will be made by the GS.

The Bureau will use any type of feasible and acceptable methodology (e.g., physical field investigation, geologic inference, etc.) for determining the mineral character classification of base lands and selected lands. Drilling or excavation programs for assessing mineral resource potential and for establishing mineral-in-character classifications are not required for either the base or public lands. Such programs will not be undertaken by the Federal Government on either base or selected lands, and State Governments will not be required to undertake such programs on base lands. As provided by law, mineral-in-character determinations of base lands will be made as of the date of selection application. State personnel will be encouraged to participate in mineral-in-character determinations and both the State and the GS will be requested to participate in the mineral valuation process.

Other Requirements

With respect to specific Federal requirements (e.g., civil rights, floodplains, cultural resources, etc.), the Bureau will consider including, where applicable, guidance and stipulations, some of which may attach to and run with the land. Such consideration should include conditions or stipulations which would obligate the States on mitigation, assurance, and compliance. Agreements (i.e., Memoranda of Understanding between BLM and State Historical Preservation Officers on Cultural-Historic Resources) should also be considered. The applicability of Title VI of the Civil Rights Act of 1964 and the regulations of 43 CFR Part 17, is currently being litigated and further advice on the resolution of this matter will be provided at a later date.

The Mutual Covenants and Agreements section of the Memorandum of Understanding Between the Western States Land Commissioners Association and the BLM, dated January 8, 1981, also contains guideline information on policy objectives. Copies of these items are included as Enclosure 1.

Adjudication Procedures

The following preliminary adjudication procedures are to be used as general guidance to complete the State Indemnity Selection program. In cases where both the State and BLM State Office can work out procedures that are more suitable to both parties, such revised procedures should be used. In exceptional cases, Headquarters Office is to be advised in writing of revised procedures. The State and the BLM must be willing to commit themselves to working out the program on a cooperative, negotiated basis, as opposed to an adversary type of proceeding.

Prior to filing of formal application by the State, the BLM State Office, in conjunction with the State, should:

A. Discuss program concept, policy requirements, procedural guidelines and expediting modifications, program schedule and priorities, budgetary requirements, necessity for supplemental memorandums of understanding to the master MOU with Western States Land Commissioners Association (WSLCA). (Refer to Instruction Memorandum No. 81-200.)

B. Verify validity of acreage entitlement, including mineral and non-mineral character types of base, where known. Reach agreement with State on validity of base entitlement and/or alternatives to resolve questions on invalid/excess base. (See Enclosure 2 as to deficiencies computation.)

C. Identify public lands suitable and available for transfer to the State. Lands meeting this criteria must meet Management Framework Plan (MFP) conformance guidelines established in Instruction Memorandum No. 81-156 (Enclosure 3).

D. Identify lands unsuitable for transfer to the State and either negotiate withdrawal of State request and/or issue letter of explanation as to reason for nonapproval of proposed selection.

E. Identify lands with conflicts — mining claim locations, cultural resources, etc. — that may delay transfer until the conflicts are resolved.

F. Identify those withdrawn lands which the State(s) are interested in selecting. Where States wish to select such land and the lands are not being used for the withdrawal purpose, negotiate

with holding agency for revocation. If continued withdrawal is justified, explain justification to State and agree/consult on an appropriate course of further action.

G. Review any list of public lands presently classified as suitable for indemnity selection to determine if there are lands the State may want to select. If so, reserve lands for subsequent application by State after obtaining commitment or positive indication of interest from the State.

Petition-Application Procedures

State Selection Petition-Application Received at State Office:

A. Serialize case,

B. Validate base lands of formal application, and

C. Following validation, accept petition for classification.

NOTE: *Segregative Effect* — Under 43 CFR 2621, the filing of a State indemnity selection immediately segregates the public lands selected from all forms of appropriation under the public lands laws; therefore, such applications are to be noted to the public land records within 3 working days after receipt of an application.

Land Classification Procedures

A. Proposed Classification decision (use 43 CFR 2400 procedures) (For example, see Enclosure 4).

B. Scoping Process — should address all of the following:

   1. Identify problems and issues,

   2. Determine the type and need for public involvement,

   3. Specify the level of detail of the environmental assessment required, and

   4. Describe the consistency with land-use plans (refer to Instruction Memorandum No. 81-156, included as Enclosure 3).

C. Environmental Assessment — Land Reports — Classification Decisions

   1. In situations where no significant problems or issues

are developed in the scoping process, prepare:

(a) Finding of No Significant Impact (FONSI) and land report (refer to BLM Manual Section 2063); and

(b) Issue Initial classification decision (use 43 CFR 2400 procedures). Identify *all* reservations and stipulations that will be included in clearlist. (For example, see Enclosure 5).

2. In situations where significant problems or issues are developed in the scoping process, prepare:

(a) Environmental assessment and land report (use BLM Manual Section 2063); and

(b) Issue initial classification decision (use 43 CFR 2400 procedures), either cancelling or approving the proposed classification in whole or part. If any part is approved, identify *all* reservations and stipulations that will go into clearlist.

D. During or at the conclusion of land classification process:

1. Identify all public lands *approvable* for transfer to the State. *Include* reservations and stipulations and *include* any access reservations where transfer will block existing access to other public lands.

2. Identify the public land acreage which is mineral-in-character and which will require State base lands to be offered which are mineral-in-character. (Note: If nonmineral base and selected public land of nonmineral character are involved, follow same procedure except as to nonmineral standards.)

3. Identify dollar values committed.

4. Negotiate with the State for withdrawal or denial of applications where appropriate, or additions of lands to applications.

5. Identify lands with conflicts to be resolved before classification and clearlist can be completed.

Adjudication — Valuation Procedures

Adjudication personnel and appraisers, in cooperation with the State, will, for:

Base Lands

A. Compare State and Bureau records of used and available entitlement acreage and reach agreement with the State on acreage and location of State base lands.

B. Obtain GS reports on all State base lands, and with aid of BLM mineral personnel, identify character (i.e., mineral or nonmineral character) of base lands. Reach agreement with the State on these determinations.

C. Prepare valuation estimates for base lands by geographic area and/or specific lands. Reach agreement with the State on these valuation estimates.

The objective of Steps A., B., and C., above, is to develop information that will enable the State and BLM to agree on the estimated values and mineral character of the base lands. This will permit the State to adjust the base lands in each block or specific tract application(s) in order to meet value and mineral character requirements prior to clearlisting.

Selected Lands

A. Review valuations of selected public lands as petition-applications and/or applications are filed, and reach agreement with the State on the value estimates.

B. Check land status on selection applications as filed and/or as negotiated with the State.

C. Obtain U.S. Geological Survey reports on selected public lands as petition-applications are filed, or in advance of selections where areas to be selected are known.

Adjudication — Clearlist Procedures

A. Appropriate office will determine:

1. Whether clearlist lands have been or will be classified;

2. Amount of acreage that has been determined to be mineral in character; and

3. Reservations, terms, conditions, etc., to be included in clearlists.

B. Appropriate office notifies State of:

1. Value of State's base land for individual selection, and

2. Acreage of lands determined to be mineral in character.

C. State revises application(s) to substitute base lands acreages as necessary to equalize the acreage of mineral base, and to insure that the base and selected land values do not exceed the value differentials outlined under the pooling and tract-for-tract concepts.

Note: Acreages of State base lands and selected public lands in each clearlist will not necessarily balance due to (a) being within the percent differential, (b) being within the 25 percent differential option, or (c) combination of (a) and (b). The State may elect to increase base lands acreages of sufficient total value to select less acreage of public lands with higher value, providing the total values (of base and selected) are equal, or are within the acceptable value range differential. Each clearlist case file must contain a value certification for both base and selected lands.

D. After base land adjustments are completed and meet the value standards (i.e., a roughly equivalent 10 percent or 25 percent differential), final clearlisting procedures will be completed, including: publication; disposition of protests, if any; notation of school lands cards, serial register page, Historical Index, Master Title and Use Plats; and signature of BLM official on clearlist.

E. Clearlist delivered/transmitted to State.

By: /s/ Ed Hastey
Associate Director

Office - Supreme Court, U.S.
FILED
JUN 20 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1621

In The
Supreme Court of the United States
October Term, 1984

OCCIDENTAL OIL SHALE, INC.,
Petitioner,

vs.

STATE BOARD OF LAND COMMISSIONERS OF COLORADO and its members Rowena Rogers, John S. Wilkes, III and Tommy Neal,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether the Colorado Supreme Court properly upheld the decision of the Colorado Land Board denying the petitioner an exploration permit under the Colorado Mineral Location Statute on the basis that the lands in question did not belong to the state upon selection.

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ARGUMENT

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STATEMENT OF THE CASE

This case involves the status, under state law, of certain lands which were selected by the respondents, State Board of Land Commissioners of Colorado (Colorado Land Board), as indemnity for lands which were not granted to the state at the time of entry into the Union, but to which the state was entitled. The Colorado Supreme Court held that these lands did not belong to the state for purposes of the Colorado Mineral Location Statute. Colo. Rev. Stat. 36-1-140 (1979).

At the time of statehood, the United States Congress granted certain lands to the State of Colorado for various public purposes. Colorado Enabling Act, sec. 7-10, 18 Stat. 474 (1875). See Appendix 1. Pursuant to the Colorado Constitution, art. IX, sec. 10, the lands which were granted to the state by the federal government at the time of statehood are to be held in trust by the Colorado Land Board which must maximize revenue therefrom for the benefit of the respective objects for which the grants of lands were made. See Appendix 2. These trust lands are subject to exclusive disposition by the Colorado Land Board on terms it deems just and proper in order to fulfill its constitutional mandate to maximize revenue. *Evans v. Simpson*, 190 Colo. 426, 547 P.2d 931 (1976); *Sunray Mid-Continent Oil Company v. State*, 149 Colo. 159, 368 P.2d 563 (1962).

The broad authority which was granted to the Colorado Land Board by the Colorado Constitution is further defined by state statute. Colo. Rev. Stat. 36-1-101 to 148 (1979). See Appendix 3. In order to maximize revenue, the Colorado Land Board is specifically authorized to lease surface rights (sec. 116, 118, 120), to lease mineral

rights (sec. 113, 115, 139), to issue rights-of-way (sec. 136), and to sell surface rights (sec. 122, 124, 137). When particularly valuable mineral lands are being considered for development, the Colorado Land Board issues mineral leases through competitive bidding. Often, bonus payments are required for the award of the lease. See Appendix 4.

In 1979, the petitioner, Occidental Oil Shale, Inc. (Occidental), attempted to circumvent the usual mineral leasing practices of the Colorado Land Board by submitting an application for a permit to explore for oil shale pursuant to the Colorado Mineral Location Statute. At the time Occidental submitted its application, this statute stated:

> 36-1-140. *Mineral locations-posting-lease.* Location of mineral claims *may be made upon unleased mineral lands belonging to the state.* The discoverer of a body of mineral in either a lead, lode, ledge, deposit, vein, or contact shall immediately post conspiciously a notice declaring that he has made such a discovery on the date attached to the notice. Within ten days after posting said notice, the discoverer must notify the state board of land commissioners of said discovery and arrange for a permit to explore the extent of the discovery. Within sixty days from date of discovery, the locator shall be required to take a lease upon such terms as may be agreed upon by the state board of land commissioners or apply for an extension of the permit.

(Emphasis added.) In 1980, this statute was amended to expressly delete coal and oil shale from its terms.

In order to obtain an exploration permit under section 140, several requirements must be met. The lands involved must be unleased and they must belong to the

state. The applicant must establish that there has been a discovery of a body of mineral, that a notice of discovery has been conspiciously posted, and that the Colorado Land Board has been notified within 10 days of the date of posting of the notice. Since the Colorado Land Board determined that the lands for which Occidental sought an exploration permit were not lands "belonging to the state" under section 140, the Colorado Land Board declined to consider Occidental's application and declined to determine whether Occidental had complied with the remaining statutory requirements. See Petition, Appendix E.

In 1979, the lands for which Occidental sought an exploration permit were under the jurisdiction and control of the federal government, as those lands are today. Nevertheless, Occidental claimed that those lands belonged to the state for purposes of the Colorado Mineral Location Statute since the Colorado Land Board had filed a selection list with the Bureau of Land Management, United States Department of the Interior (BLM), for certain "indemnity" lands, including the subject lands.

Pursuant to federal statute, a state may select lands as indemnity for lands which were intended to be granted, but which did not pass, to the state at the time of statehood. 43 U.S.C. sec. 851, 852 (1982). Colorado, like other western states, received lands from the federal government on entry into the Union. In Colorado's case, the federal government granted sections 16 and 36 of each township to be managed for the support of the public schools. Colorado Enabling Act, sec. 7. Since the lands granted to Colorado at statehood did not pass until they were identified by survey, which survey was not com-

pleted until long after statehood, many acres had been otherwise disposed of in the intervening years before survey. In addition, by virtue of the earth's curvature, surveying often revealed that certain of the granted sections were only partial or did not exist at all. As indemnity for the lands which never passed to the state, Colorado has the right to select lands in lieu of the granted sections (base lands). However, both Occidental and the Colorado Land Board agree that title to these indemnity lands does not pass to the state until the Secretary of the Interior approves the selection and clearlists the lands. See Petition, p. 9.

By letter dated January 27, 1978, the Colorado Land Board was advised that the BLM had identified several acres of unsatisfied indemnity lands which had been determined by actual survey or by protraction. See Appendix 5. Ultimately, the BLM determined that Colorado was entitled to indemnity for 11,482.31 acres. On September 4, 1979, the Colorado Land Board filed a selection list with BLM for 6,840 acres of indemnity land which the state had determined contained valuable oil shale deposits. See Appendix 6. Twenty days after the Colorado Land Board filed its selection list, Occidental claimed it had discovered oil shale on the selected lands and requested an exploration permit. The Colorado Land Board denied Occidental's request, since the selected lands had not been clearlisted by the Secretary of the Interior. See Petition, Appendix E. Although it has been 6 years since the selection list was filed, BLM has not taken final action yet on Colorado's indemnity selection.

Occidental sought judicial review in Denver District Court of the Colorado Land Board's denial of the request

for an exploration permit. See Petition, Appendices C and D. The decision of that court was appealed to the Colorado Supreme Court. See Petition, Appendix A. Based upon the language of the Colorado Mineral Location Statute, the Colorado Supreme Court upheld the Colorado Land Board's decision.

> When Occidental submitted its application for an exploration permit, section 36-1-140 provided that "location of mineral claims may be made on unleased mineral lands belonging to the state." We conclude that the selected lands were not "lands belonging to the state" at the time Occidental made is alleged discovery.

Occidental Oil Shale, Inc. v. State Board of Land Commissioners, 692 P.2d 321, 323 (Colo. 1984). From this decision by the Colorado Supreme Court, which affirms the Colorado Land Board's interpretation of a Colorado statute, Occidental seeks review by this Court.

SUMMARY OF THE ARGUMENT

In this case, Occidental attempts to obtain review of the Colorado Supreme Court's decision in *Occidental Oil Shale, Inc. v. State Board of Land Commissioners, supra.* Occidental claims that review by this Court is necessary by improperly asserting that a federal question is raised by the holding of the Colorado Supreme Court. Occidental's assertions are based upon a constrained reading of the Colorado Supreme Court's decision. That decision does not involve a federal question, but rather a state court review of a state agency's interpretation of a state

statute. Furthermore, even if a federal question were involved, Occidental may not properly raise it. Accordingly, the Colorado Land Board respectfully submits that this case is not proper for review by this Court.

ARGUMENT

I.

The Petition For Writ Of Certiorari Should Be Denied, Since The Only Issue Presented Is Whether The Colorado Supreme Court Properly Construed A Colorado Statute Which Does Not Raise A Significant Federal Question.

In the opinion rendered below, the Colorado Supreme Court framed only one issue. The sole question for its determination was whether certain lands, which the Colorado Land Board had selected as indemnity lands but which had not been clearlisted, were "lands belonging to the state" under the Colorado Mineral Location Statute. Colo. Rev. Stat. 36-1-140 (1979). The Colorado Supreme Court held:

> In summary, we hold that the lands in question did not belong to the state upon selection and that Occidental could not locate mineral claims on these lands pursuant to section 36-1-140 for this reason. Thus, the board's decision to deny Occidental an exploration permit was proper.

Occidental Oil Shale, Inc., 692 P.2d at 325. The Colorado Supreme Court's interpretation of state law was proper and should not be reviewed by this Court.

A. The Colorado Supreme Court properly determined, under state law, that Occidental was not entitled to a permit to explore for oil shale on selected indemnity lands.

In the case below, the Colorado Land Board advanced several arguments, based on state law, in support of its position that selected indemnity lands are not "lands belonging to the state" under the Colorado Mineral Location Statute. There are adequate and independent nonfederal grounds for the Colorado Supreme Court's decision which should not be disturbed by this Court. *Black v. Cutter Laboratories*, 351 U.S. 292, 297-98 (1955); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1944).

At the time the Colorado Mineral Location Statute (section 140) was passed, the phrase "lands belonging to the state" was clearly not intended to include selected indemnity lands. Section 140 was initially adopted in 1919 at a time when much of Colorado's mineral wealth was unknown, when Colorado's territory was largely unsurveyed and when Colorado could not choose mineral lands in exercising its indemnity selections. The original grant of land to Colorado did not include mineral lands. Colorado Enabling Act, sec. 15. Similarly, the initial federal selection statutes precluded states from selecting indemnity lands known to be mineral in character. However, in 1927, Congress enacted legislation which permitted states to take title to minerals underlying numbered school sections, the result of which was to produce mineral base lands. 44 Stat. 1026 (1927). Then, in 1958, states were given the right to select mineral indemnity lands in lieu of lost base lands proven to be mineral in character. Pub. L. 85-771, sec. 2, 72 Stat. 928 (1958). Thus, without

question, section 140 could not have been intended to apply to selected mineral indemnity lands, since Colorado did not have authority to select such lands until almost 40 years after section 140 was passed.

In addition, the exclusion of indemnity lands from the operation of section 140 is consistent with the Colorado Land Board's constitutional duty to maximize revenue. Under the terms of section 140, a prospector claiming discovery of valuable minerals on lands belonging to the state may, upon compliance with certain specified procedures, reveive a 60-day permit from the Colorado Land Board to explore the claim. Subsequently a preferential lease may be negotiated with the Colorado Land Board to develop the located minerals. The ability to obtain a preferential lease from the Colorado Land Board under section 140 is in striking contrast to the Colorado Land Board's normal leasing procedures. Mineral lands which are known to contain particularly valuable deposits are ordinarily leased by competitive bid. See Appendix 4. In this way, the Colorado Land Board best fulfills its constitutional duty to administer the state's trust lands to produce maximum revenue for support of the public schools. Colo. Const. art. IX, sec. 10. Section 140 must be construed narrowly so that the Colorado Land Board's constitutional duty to maximize revenue will not be impeded.

Also, by its terms, section 140 demonstrates a certain immediacy which will not be served by including indemnity lands. This section applies solely to discoveries of a body of mineral in a lead, lode, ledge, deposit, vein or contact on unleased mineral lands belonging to the state. Only if conspicious notice of the discovery, includ-

ing the date thereof, is immediately posted, and the Colorado Land Board is notified within 10 days of the discovery, is there a right to arrange for a permit to explore further. The permit expires after 60 days at which time a permit extension must be requested or a lease must be negotiated with the Colorado Land Board.

In the instant case, it has been almost 6 years since the Colorado Land Board selected the indemnity lands on which Occidental allegedly discovered oil shale. It is uncertain whether a clearlist to these lands will ever issue. Nevertheless, Occidental claims that it should be entitled to an exploration permit and to negotiate a future preferential lease, if and when the selected lands do vest in the state, regardless of the desirability or suitability of the Colorado Land Board's issuing a mineral lease at that time. It is clear that the Colorado Mineral Location Statute was never intended to operate in such a manner.

The foregoing establishes that, purely on the basis of state law, it was proper for the Colorado Supreme Court to determine that selected indemnity lands were not "lands belonging to the state" under the Colorado Mineral Location Statute. Therefore, even if the Colorado Supreme Court incorrectly interpreted federal law as Occidental maintains, and this Court were to correct that interpretation, the same judgment could be issued by the Colorado Supreme Court. This Court's opinion would then be nothing more than an advisory opinion, which this Court has stated it is not entitled to render. *Herb v. Pitcairn*, 324 U.S. at 126. Accordingly, this Court should decline to review the Colorado Supreme Court's decision.

B. The Colorado Supreme Court's decision upholding the Colorado Land Board's interpretation of a state statute does not raise a significant federal question.

In support of its position, Occidental argues that this case presents significant federal questions regarding the nature of Colorado's interest in the lands selected under the indemnity statutes. Occidental claims that the Colorado Supreme Court, based upon a misinterpretation of *Andrus v. Utah*, 446 U.S. 500 (1980), indirectly repealed the indemnity land statutes, incorrectly concluded that equitable title did not vest upon selection, and "mechanically" applied the grossly disparate value test improperly. See Petition, pp. 7, 12, 13, 15. Occidental devotes its entire petition to this improper characterization of the issues. The Colorado Supreme Court did not indirectly repeal the indemnity land statutes, it did not hold that equitable title does not vest upon selection, and it did not even apply a grossly disparate value test much less apply this test improperly since final action has not been taken on Colorado's selection list. The only issue considered and decided by the Colorado Supreme Court was whether Occidental was entitled to an exploration permit under the Colorado Mineral Location Statute.

In this case, the Colorado Supreme Court concluded that Occidental was not entitled to a permit to explore for oil shale on indemnity lands which had been selected by the Colorado Land Board, but not yet clearlisted by the Secretary of the Interior, since those lands were not "lands belonging to the state" for purposes of the Colorado Mineral Location Statute. In the course of its decision, the Colorado Supreme Court addressed this Court's

holding in *Andrus* which affirmed the Secretary of the Interior's broad discretion regarding the approval or disapproval of selection lists. In the proper exercise of the Secretary's discretion, the Colorado Supreme Court noted that a state's indemnity selection could be denied.

> Even assuming that a state selection of land satisfies all of the criteria for a proper selection of indemnity lands as detailed in 43 U.S.C. secs. 851-852, the Secretary of the Interior in the proper exercise of his discretion can withhold the lands from classification as indemnity lands and deny the selection.

Occidental Oil Shale Inc., 692 P.2d 324. *Accord Justheim v. Division of State Lands*, 659 P.2d 1075 (Utah 1983). Occidental does not disagree with the Colorado Supreme Court's conclusion regarding the Secretary of the Interior's discretion, but Occidental contends that the Colorado Supreme Court impermissibly extended this conclusion to hold that equitable title no longer vests upon selection. The Colorado Supreme Court did not enter such a holding and, although Occidental would have this Court believe otherwise, the court was not requested to do so by the Colorado Land Board.

Throughout this case, the Colorado Land Board has maintained that it obtained an equitable interest in the selected lands upon the filing of its selection list. It is the position of the Colorado Land Board that, pending the Secretary of the Interior's decision to classify withdrawn lands as available for selection and the determination to clearlist the lands, the federal government cannot sell or otherwise divest itself of the selected land to a third party. The Colorado Land Board's position is consistent with BLM's position on this issue. The filing of

a selection list has been deemed by the BLM to have a "segregative effect" pending classification and clearlisting. "The filing of a state indemnity selection immediately segregates the public land selected from all forms of appropriation under the Public Lands Law." Bureau of Land Management, Instruction Memorandum No. 82-33. See Petition, Appendix G, p. 32a. Thus, a state obtains equitable interests in selected indemnity lands.

The Colorado Land Board's position regarding the nature of a state's equitable interest in selected lands also is supported by decisions of this Court. In *Wyoming v. United States,* 255 U.S. 489, 501 (1921), this Court ruled that the federal government holds selected lands in trust for a state until a final decision is made regarding the classification and clearlisting of those lands, thus creating equitable interests in the selected lands. Occidental agrees that this Court's holding in *Wyoming* was not altered by *Andrus.* See Petition, p. 8. The *Wyoming* decision also was not altered by the Colorado Supreme Court in this case.

In *Andrus,* the Secretary of the Interior had denied Utah's selection of certain lands on the basis that, though equal in acreage to the base lands, the selected lands were so unequal in value that the Secretary of the Interior could reject the selection (disparate value test). Utah appealed the Secretary of the Interior's decision. Due to certain legislative and executive actions, this Court held that the Secretary of the Interior had broad discretion concerning the classification of lands as open and available for selection and that the Secretary of the Interior could reject a selection on the basis of grossly disparate values between the indemnity and the base lands. This Court did not render an opinion, however, regarding the nature of the

state's equitable interest in selected lands. Similarly, in the present case, the Colorado Supreme Court did not issue a decision regarding the state's equitable interest in selected lands.

By contrast with *Andrus,* the case below was not brought against the federal government and did not arise in the context of the Secretary of the Interior's rejection of a Colorado indemnity land selection. In fact, the Secretary of the Interior has not taken final action with respect to Colorado's selection and there is no issue in this case regarding the propriety of Colorado's selection. Neither the procedural requirements, the nature of the granted lands, nor the value of the selected lands are at issue here. This case does not present issues relating to the proper interpretation of federal selection statutes as did *Andrus.* Instead, this case involves a dispute between a private corporation and a state over whether the state must grant an exploration permit and enter into a preferential lease with that corporation, or whether the state can wait until the Secretary of the Interior clearlists the land after which time, if and when appropriate, the state may lease the land in a manner designed to maximize revenue.

The Colorado Supreme Court's decision does not operate tc deprive a state of its equitable interest in selected indemnity lands since the Colorado Supreme Court never reached that issue. The only issue determined by the Colorado Supreme Court was that, whatever the state's interest in selected lands may be, that interest is not sufficient to qualify those lands as "belonging to the state" for purposes of the Colorado Mineral Location Statute. Therefore, a significant federal question has not been raised by this case.

II.

The Petition For Writ Of Certiorari Should Be Denied Since Occidental Has Not Claimed A Deprivation Of Its Federally Protected Rights And Since It Cannot Demonstrate That It Would Be Benefited By Review By This Court.

Occidental maintains that the Colorado Supreme Court's concise and clear opinion must be vacated to prevent injury to all public land states with selections remaining to be made. See Petition, pp. 8, 15, 16. Occidental is not entitled to review on those grounds.

A party seeking review of a state court decision "must show that enforcement of the challenged judgment would deprive it—not another—of some right arising under the Constitution or the laws of the United States properly asserted below." *Liberty Warehouse Co. v. Burley Tobacco Growers' Coop,* 276 U.S. 71, 88 (1927); 28 U.S.C. sec. 1257(3). Neither in its petition before this Court nor before the Colorado Supreme Court, did Occidental claim a deprivation of any federally protected rights it may have. The entire basis of Occidental's petition is that the rights of states have been adversely affected by the Colorado Supreme Court's decision. Certainly Occidental, a private corporation, does not represent the citizens of the public land states who are allegedly injured by the Colorado Supreme Court's decision. The Colorado Land Board submits that Occidental has framed issues concerning a state's equitable interests in selected lands which issues only involve Occidental's pecuniary interests but which do not involve Occidental's federally protected rights. Thus, Occidental is not entitled to obtain review from this Court.

Furthermore, even if this Court were to review and vacate the Colorado Supreme Court's decision, Occidental would not necessarily benefit thereby since it may never be entitled to negotiate a preferential lease with the Colorado Land Board. No determination has ever been made as to whether Occidental has complied with all of the requirements of the Colorado Mineral Location Statute. See Petition, Appendix E, p. 17a. Such compliance will be difficult to establish. Since the Colorado Land Board selected the lands at issue for their known oil shale deposits, it may be impossible for Occidental to demonstrate that it "discovered" oil shale on this property. Thus, even if the Colorado Supreme Court's decision were vacated by this Court, no meaningful benefit may flow to Occidental due to the tenuous nature of Occidental's rights, if any under the Colorado Mineral Location Statute. Accordingly, the petition for writ of certiorari should not be granted. *See Bateman v. Arizona,* 429 U.S. 1302 (1976).

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CONCLUSION

For the foregoing reasons, the Colorado Land Board respectfully requests that the petition for writ of certiorari be denied.

DATED this 18 day of June, 1985.

Respectfully submitted,

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APPENDIX 1

ENABLING ACT

AN ACT TO ENABLE THE PEOPLE OF COLORADO TO FORM A CONSTITUTION AND STATE GOVERNMENT, AND FOR THE ADMISSION OF THE SAID STATE INTO THE UNION ON AN EQUAL FOOTING WITH THE ORIGINAL STATES.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled:

§ 1. *Authority to form state.* That the inhabitants of the territory of Colorado included in the boundaries hereinafter designated, be, and they are hereby authorized to form for themselves, out of said territory, a state government, with the name of the state of Colorado; which state, when formed, shall be admitted into the Union upon an equal footing with the original states in all respects whatsoever, as hereinafter provided.

§ 2. *Boundaries.* That the said state of Colorado shall consist of all the territory included within the following boundaries, to-wit: commencing on the thirty-seventh parallel of north latitude where the twenty-fifth meridian of longitude west from Washington crosses the same; thence north, on same meridian, to the forty-first parallel of north latitude; thence along said parallel west to the thirty-second meridian of longitude west from Washington; thence south on said meridian, to the thirty-seventh parallel of north latitude; thence along said thirty-seventh parallel of north latitude to the place of beginning.

§ 3. *Convention - election - apportionment - proclamation.* That all persons qualified by law to vote for representatives to the general assembly of said territory, at the date of the passage of this act, shall be qualified to be elected, and they are hereby authorized to vote for and choose representatives to form a convention, under such rules and regulations as the governor of said territory, the chief justice, and the United States attorney thereof may prescribe; and also to vote upon the acceptance or rejection of such constitution as may be formed by said convention, under such rules and regulations as said convention may prescribe; and the aforesaid representatives to form the aforesaid convention shall be apportioned among the several counties in said territory in proportion to the vote polled in each of said counties at the last general election as near as may be; and said apportionment shall be made for said territory by the governor, United States district attorney, and chief justice thereof, or any two of them; and the governor of said territory shall, by proclamation, order an election of the representatives aforesaid, to be held throughout the territory at such time as shall be fixed by the governor, chief justice and United States attorney, or any two of them; which proclamation shall be issued within ninety days next after the first day of September, eighteen hundred and seventy-five, and at least thirty days prior to the time of said election; and such election shall be conducted in the same manner as is prescribed by the laws of said territory regulating elections therein, for members of the house of representatives; and the number of members to said convention shall be the same as now constitutes both branches of the legislature of the aforesaid territory.

§ 4. *Constitutional convention - requirements of constitution.* That the members of the convention thus elected shall meet at the capital of said territory, on a day to be fixed by said governor, chief justice, and United States attorney, not more than sixty days subsequent to the day of election, which time of meeting shall be contained in the aforesaid proclamation mentioned in the third section of this act, and after organization, shall declare, on behalf of the people of said territory, that they adopt the constitution of the United States; whereupon the said convention shall be and is hereby authorized to form a constitution and state government for said territory; provided, that the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the declaration of independence; and, provided further, that said convention shall provide by an ordinance irrevocable without the consent of the United States and the people of said state; first, that perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property, on account of his or her mode of religious worship; secondly, that the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States; and that the lands belonging to citizens of the United States residing without said state shall never be taxed higher than the lands belonging to residents thereof, and that no taxes shall be imposed by the state on lands

or property therein belonging to, or which may hereafter be purchased by the United States.

§ 5. *Adoption of constitution - president to proclaim.* That in case the constitution and state government shall be formed for the people of said territory of Colorado, in compliance with the provisions of this act, said convention forming the same shall provide by ordinance for submitting said constitution to the people of said state for their ratification or rejection, at an election to be held at such time, in the month of July, eighteen hundred and seventy-six, and at such places and under such regulations as may be prescribed by said convention, at which election the lawful voters of said new state shall vote directly for or against the proposed constitution; and the returns of said election shall be made to the acting governor of the territory, who, with the chief justice and United States attorney of said territory, or any two of them, shall canvass the same; and if a majority of the legal votes shall be cast for said constitution in said proposed state, the said acting governor shall certify the same to the president of the United States, together with a copy of said constitution and ordinances, whereupon it shall be the duty of the president of the United States to issue his proclamation declaring the state admitted into the Union on an equal footing with the original states, without any further action whatever on the part of Congress.

§ 6. *One representative - officers - election.* That until the next general census said state shall be entitled to one representative in the house of representatives of the United States, which representative, together with the governor and state and other officers provided for in said

constitution, shall be elected on a day subsequent to the adoption of the constitution, and to be fixed by said constitutional convention; and until said state officers are elected and qualified under the provisions of the constitution, the territorial officers shall continue to discharge the duties of their respective offices.

§ 7. *School lands.* The sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of congress, other lands equivalent thereto in legal sub-divisions of not more than one quarter-section, and as contiguous as may be, are hereby granted to said state for the support of common schools.

§ 8. *Land for public buildings.* That, provided the state of Colorado shall be admitted into the Union in accordance with the foregoing provisions of this act, fifty entire sections of the unappropriated public lands within said state, to be selected and located by direction of the legislature thereof, and with the approval of the president, on or before the first day of January, eighteen hundred and seventy-eight, shall be and are hereby granted, in legal sub-divisions of not less than one quarter-section, to said state for the purpose of erecting public buildings at the capital of said state, for legislative and judicial purposes, in such manner as the legislature shall prescribe.

§ 9. *Land for penitentiary.* That fifty other entire sections of land as aforesaid, to be selected and located and with the approval as aforesaid, in legal sub-divisions as aforesaid, shall be, and they are hereby granted, to said state for the purpose of erecting a suitable building for a penitentiary or state prison in the manner aforesaid.

§ 10. *Land for university.* That seventy-two other sections of land shall be set apart and reserved for the use and support of a state university, to be selected and approved in manner as aforesaid, and to be appropriated and applied as the legislature of said state may prescribe for the purpose named and for no other purpose.

§ 11. *Salt Springs.* That all salt springs within said state not exceeding twelve in number, with six sections of land adjoining, and as contiguous as may be to each, shall be granted to said state for its use, the said land to be selected by the governor of said state within two years after the admission of the state, and when so selected to be used and disposed of on such terms, conditions and regulations as the legislature shall direct; provided, that no salt springs or lands, the right whereof is now vested in any individual or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall by this act be granted to said state.

§ 12. *Sale of agricultural lands.* That five per centum of the proceeds of the sales of agricultural public lands lying within said state, which shall be sold by the United States subsequent to the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to the said state for the purpose of making such internal improvements within said state as the legislature thereof may direct; provided, that this section shall not apply to any lands disposed of under the homestead laws of the United States, or to any lands now or hereafter reserved for public or other uses.

§ 13. *Unexpended balance of appropriations.* That any balance of the appropriations for the legislative ex-

penses of said territory of Colorado remaining unexpended, shall be applied to and used for defraying the expenses of said convention, and for the payment of the members thereof, under the same rules and regulations and rates as are now provided by law for the payment of the territorial legislature.

§ 14. *School lands - how sold.* That the two sections of land in each township herein granted for the support of common schools shall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the proceeds to constitute a permanent school fund, the interest of which to be expended in the support of common schools.

§ 15. *Mineral lands excepted.* That all mineral lands shall be excepted from the operation and grants of this act.

APPENDIX 2

Section 9. *State board of land commissioners.* The state board of land commissioners shall be composed of three (3) persons to be appointed by the governor, with the consent of the senate, who shall have the direction, control and disposition of the public lands of the state under such regulations as are and may be prescribed by law, one of which persons shall at the time of his appointment be designated as president of the board and whose office shall expire on the second Tuesday of January, 1917, one of which persons shall at the time of his appointment be designated as register of the board and whose term of office shall expire on the second Tuesday of January, 1915, and the third member of said board shall at the time of his appointment be designated as the engineer of the board and shall always be professionally a civil engineer, who, for at least five (5) years, has been actively engaged in the practice of his profession and whose term of office shall expire on the second Tuesday of January, 1913; and the successor and successors of the first members of the board shall each be appointed for the terms of six (6) years.

On the adoption of this amendment by the electors of this state, it shall not go into full force and effect until the second Tuesday of January, 1911.

The members of the board shall each receive a salary of three thousand dollars ($3,000) per annum until otherwise provided by law; but the salary of each member of this board is to be paid out of the income of the said state board of land commissioners.

Section 10. *Selection and control of public lands.* It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or other disposition of all the lands heretofore, or which may hereafter be granted to the state by the general government, under such regulations as may be prescribed by law; and in such manner as will secure the maximum possible amount therefor. No law shall ever be passed by the general assembly granting any privileges to persons who may have settled upon any such public lands subsequent to the survey thereof by the general government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly. The general assembly shall, at the earliest practicable period, provide by law that the several grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made, and the general assembly shall provide for the sale of said lands from time to time; and for the faithful application of the proceeds thereof in accordance with the terms of said grants.

APPENDIX 3

36-1-101. *Record of proceedings.* The state board of land commissioners shall keep a complete record of its proceedings in a suitable book and shall preserve all important papers and documents pertaining to the state lands.

36-1-101.5. *Appointment of members.* The state board of land commissioners shall be composed of three members appointed by the governor, with the consent of the senate, who shall have the direction, control, and disposition of the public lands of the state. One of such members shall, at the time of his appointment, be designated as president of the board; one of such members shall, at the time of his appointment, be designated as register of the board; and the third member of said board shall, at the time of his appointment, be designated as the engineer of the board and shall always be professionally a civil engineer who, for at least five years, has been actively engaged in the practice of his profession. Successors to the present members of the board shall each be appointed for a term of six years. Not more than two members of the board may be of one major political party, and the third member shall be a member of the other major political party.

36-1-102. *Employees-register-hearings-bonds-report.* (1) The state board of land commissions is authorized to employ, pursuant to section 13 of article XII of the state constitution, an office force. It is the duty of the register to keep the records of the state board of land commissioners; to make out and countersign all patents and leases issued by the board to purchasers and lessees of state

lands, and keep a suitable record of the same; to file and preserve bonds of lessees and those given by purchasers to secure deferred payments; to make and deliver to purchasers a suitable certificate of purchase; to have the custody of the seal of the state board of land commissioners; to keep the minutes of the board; to receive all moneys from the deputy register collected by such officer on account of the state board of land commissioners, and to pay them over to the state treasurer, as prescribed by law, and in the absence of the deputy register to receipt for and receive all moneys payable to the state board of land commissioners; and to perform such other duties concerning the land affairs of the state as the said board may direct.

(2) It is also the duty of the register in all contested cases, at the direction of the board, when hearings are necessary and witnesses may be required to be examined, to set a date for hearing such cases. The register shall duly advise the contestants and their accredited attorneys of the date set for such hearings, and on the date appointed the register is empowered to administer oaths and to hear and receive evidence in the manner and procedure established by the United States in the district land offices, or in accordance with the rules that are adopted by the board governing such cases. All evidence given and provided in such cases before the register shall be fully transcribed and arranged at the cost of the parties to the contest, and shall form a part of the records of the office of the state board of land commissioners. The register shall, as soon as convenient after such hearings, present a full transcript of the proceedings to the

state board of land commissioners, which shall render a decision in accordance therewith.

(3) The board shall be provided with a suitable office and office furniture by the office of state planning and budgeting.

(4) The board shall publish each year, subject to the approval and control of the executive director of the department of natural resources, a summary of the transactions of the state board of land commissioners, and the land affairs of the state, showing, by tables, the land belonging to the several funds of the state, to whom sold, the amount leased, the receipts from all sources, and shall contain any such other items or information concerning state lands as the state board of land commissioners or the executive director of the department of natural resources may deem worthy of publication.

(5) Before assuming the duties of his office, each member of the state board of land commissioners shall give a surety bond, the expense of which shall be paid from the operating funds of the state board of land commissioners in the sum of thirty thousand dollars, conditional upon the faithful discharge of his duties, which bond shall be approved by the governor and state treasurer and filed with the secretary of state.

(6) The board shall report annually to the executive director of the department of natural resources at such time and on such matters as the executive director may require. Publications of the board circulated in quantity outside the department shall be subject to the approval and control of the executive director.

36-1-103. *Deputy register-duties-bond.* It is the duty of the deputy register to receipt and account for all moneys payable to the state board of land commissioners, and the deputy register shall pay the same over to the register daily. The deputy register shall give a good and sufficient surety bond, the cost of which shall be paid by the state, to be approved by the state board of land commissioners, for the faithful performance of the duties pertaining to that position, in the amount of thirty thousand dollars. The deputy register shall perform such other duties as may be prescribed by the state board of land commissioners.

36-1-104. *Deed-execution-copy of record.* (1) The governor is authorized, and, in case of his absence or inability, the lieutenant governor is authorized to execute a good and sufficient deed or patent of conveyances, transferring any lands which may be ordered sold, or which shall be sold and disposed of by the state board of land commissioners under the statutes of this state. Such deed or patent shall be attested by the secretary of state, countersigned by the register, and have the great seal of the state and the seal of the state board of land commissioners thereto attached, but need not be acknowledged. A certified copy of the record of any such deed or patent shall be receivable in evidence in all courts of record in this state, the same as the original.

(2) Where such deed or patent may be issued pursuant to this section, to a person who has died before the date of such deed or patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased grantee or

patentee as if the deed or patent had issued to the deceased person during life.

36-1-105. *Selection and location of lands.* It is the duty of the state board of land commissioners to select and locate all lands which are on or after March 31, 1919, granted to this state by the general government, for any purpose whatever, and the board shall take the necessary steps to secure the approval of such selections by the proper officers of the general government. In making such selections, the board may employ such agents and means as may be necessary to acquaint the board with the character of the lands selected; and the board may provide to have the lands belonging to the state classified and appraised.

36-1-106. *Appraisers' reports.* Appraisers shall make stated written reports of their work to the state board of land commissioners and such special reports as may be required from time to time. Such reports shall be made upon suitable uniform blanks to be provided by the board for such purpose wherein shall be set forth the legal description, general character and adaptability and estimated value of each of the several pieces, parcels, or tracts of land embraced in any such report, together with such other useful information as may be required by the board.

36-1-107. *Resolution of selection.* The state board of land commissioners from time to time shall make selection and location of the lands to which the state is entitled under the several grants of land from congress by including in its minutes a proper resolution, particularly designating all such pieces, parcels, or tracts of land so selected and located, and thereupon from time to time

said board shall promptly take all necessary and proper steps to effectually secure the approval thereof by the proper officers of the general government.

36-1-108. *Appraisal-classification-plat.* Immediately after the selection of said indemnity land is completed, the state board of land commissioners shall begin a general appraisal of all lands owned by the state. The board shall provide proper books for such purpose wherein shall be set forth the legal description, general character and adaptability and appraised valuation of each of the several pieces, parcels, or tracts of lands so classified and appraised, together with such other useful information as the board shall deem necessary. The board also from time to time shall provide proper plats showing all such lands so classified and appraised.

36-1-109. *Reclassification.* The state board of land commissioners has the power from time to time to reclassify and reappraise any lands owned by the state and shall make the same record thereof as provided by this article for the original classification and appraisal of such lands and shall make the necessary notations or changes on its existing records.

36-1-110. *Books and plats-public records.* All books and plats required by this article to be provided and kept by the state board of land commissioners shall be a part of the public records of said board and shall be open to inspection.

36-1-111. *Land appraisers.* The state board of land commissioners shall appoint, pursuant to section 13 of article XII of the state constitution, such appraisers of state lands as are necessary. The appraisers shall be un-

der the direction of the state board of land commissioners. There shall be appropriated a sufficient sum per annum for the purpose of defraying the expenses of the appraisers when visiting the different portions of the state in the discharge of their duties.

36-1-112. *Fees-disposition of fees.* (1) The state board of land commissioners is authorized to collect the fees fixed in this subsection (1) for the issuance of leases, patents, certificates of purchase, right-of-way documents, and recording assignments, for the making of township plats, for the filing of bonds, and for the filing of all documents necessary to be filed in the office, as follows:

(a) Filing application to lease for each one hundred sixty acres or fraction thereof ..... $ .75

(b) Filing application to purchase for each one hundred sixty acres or fraction thereof 1.00

(c) Accepting and approving bond 3.00

(d) Issuing lease, each one hundred sixty acres or fraction thereof 2.00

(e) For each additional one hundred sixty acres or fraction thereof in the same lease ..... .75

(f) For issing patent or certificate of purchase, each one hundred sixty acres or fraction thereof 4.00

(g) Assignment recording fees:

(I) Mineral lease 25.00

(II) Surface lease 5.00

(III) Certificate of purchase 5.00

(h) Patent for town lot, one or more 5.00

(i) Right-of-way documents, easements, etc. 10.00

(j) For issuing permission to make improvements in excess of amount allowed by the terms of the lease 5.00

(k) Certified copies of any instrument or of the records shall be furnished at the rate of twenty-five cents per folio and two dollars for the certification.

(l) Each application for lease must be accompanied by a lease service fee of ten dollars, in addition to the filing fee.

(m) All applications for purchase must be accompanied by an appraisement fee of seventy-five dollars in addition to the filing fee.

(n) If the board orders a sale to be made, the applicant shall be required to pay an advertising fee of seventy-five dollars.

(o) All township plats shall be furnished at two dollars each.

(p) For subdividing mineral lands into lots of ten acres each for the purpose of leasing, upon application of any person, a deposit of twenty-five dollars for each lot shall be required.

(q) Filing fee for rights-of-way granted pursuant to section 36-1-136 .....75.00

(r) Timber sale applications if timber is at least one thousand dollars in value 25.00

(s) Timber permit applications if timber is less than one thousand dollars in value 15.00

(t) The successful purchaser shall be required to pay the actual cost of all legal advertising. If the applicant is not the successful purchaser he shall be reimbursed for the advertising fee paid.

(2) All moneys collected by the state board of land commissioners for fees collected as specified in subsection (1) of this section shall be deposited by the register of the state board of land commissioners with the state treasurer for credit as provided in section 36-1-148.

36-1-113. *Leases—rental—mineral lands.* (1) The state board of land commissioners may lease any portion of the land of the state at a rental to be determined by it, except as provided in sections 36-1-118 and 36-1-147. The lessee shall pay the annual rental to the state board of land commissioners, who shall receipt for the same in the lease. Upon receiving such annual rental, the board shall transmit the same to the state treasurer, as provided by law, and take his receipt therefor. If geothermal resources or stone, coal, oil, gas, or other minerals not mentioned in this section are found upon the state land, such land may be leased for the purpose of obtaining therefrom the geothermal resource or stone, coal, oil, gas, or other minerals, for such length of time and conditioned upon the payment to the board of such royalty upon the product as the state board of land commissioners may determine.

(2) All geothermal leases issued by the state board of land commissioners may be awarded as the result of negotiation or competitive bidding, but no such lease shall be executed until after at least thirty days' public notice that the award of a lease is contemplated.

36-1-114. *Adjustment of rentals.* The state board of land commissioners has the direction, control, and disposition of the public lands of the state as provided for in section 9 of article IX of the state constitution, and when, in its opinion conditions justify, has the power to adjust rentals under any existing, expired, or defaulted lease on state lands in a manner to secure the maximum possible revenue as provided for in section 10 of article IX of the state constitution, and may accept payments on delinquent rentals in accordance with such adjustments.

36-1-115. *Development of oil, gas, or geothermal resource areas.* The state board of land commissioners is authorized to join on behalf of the state in a cooperative or unit plan of development or operation for any oil, gas, or geothermal resource pool, field, or area, or for any part of any such pool, field, or area, with the United States government and its lessees or with others or with both such parties and, for that purpose, is authorized at or after the time of joining to modify and change any and all terms of the leases issued under the provisions of articles 1 to 8 of this title as mutually agreed by the lessor and lessee in any such lease, including the extension of the term of years otherwise applicable to any such lease for the full period of time such cooperative or unit plan may remain in effect, as required to conform with the terms of any such lease to such cooperative or unit plan and to facilitate the efficient and economic production of the oil, gas, or geothermal resource from the lands so affected. Any such cooperative or unit plan, including lands owned by the state, may, in the discretion of the state board of land commissioners, contain a provision whereby authority is vested in the secretary of the interior if lands of

the United States are also included or in any such person, committee, or state or federal officer or agency as may be designated in the plan to alter or modify from time to time the rate of prospecting and development and the quantity and rate of production under such plan.

36-1-116. *Disposition of rentals, royalties, and timber sale proceeds.* (1) (a) Proceeds received by the state for the sale of timber on public school lands; rental payments for the use and occupation of the surface of said lands; and rentals or lease payments for sand, gravel, clay, stone, coal, oil, gas, geothermal resources, gold, silver, or other minerals on said lands shall be credited to the public school income fund for distribution as provided by law.

(b) Royalties and other payments for the depletion or extraction of a natural resource on said lands shall be credited to the public school permanent fund.

(2) (a) Proceeds received by the state for the sale of timber on lands belonging to any of the state trust funds other than on public school lands; rental payments for the use and occupation of the surface of said lands; and rentals or lease payments for sand, gravel, clay, stone, coal, oil, gas, geothermal resources, gold, silver, or other minerals on said lands shall be credited to the proper trust income fund.

(b) Royalties and other payments for the depletion or extraction of a natural resource on said lands shall be credited to the proper permanent trust fund.

(3) This section is subject to the provisions of section 36-1-145.

36-1-117. *Leases, rentals payable in advance.* All leases of state or school lands shall be conditioned upon the payment of rent in advance, and the violation of this condition shall work a forfeiture of the lease, at the option of the state board of land commissioners, after thirty days' notice to the lessees. Notice shall be sent to the last known post office address of the lessee, as given by himself to the register of the state board of land commissioners.

36-1-118. *Terms of leasing—renewals—sale of leased land.* (1) (a) The public lands of the state may be leased by the state board of land commissioners in such manner and to such persons as will produce an optimum long-term revenue. No lease of such lands for grazing or agricultural purposes shall be for a longer period than ten years.

(b) In determining the maximum benefit to the state in the renewal of any expiring lease, the board shall consider, among other things, the care and use given the land and the development work done by the lessee in conserving and promoting the productivity thereof and in promoting optimum long-term revenue for school purposes, and the classification, location, and contribution to the unit controlled by the lessee.

(c) Before land is leased to anyone other than the present lessee, said present lessee shall be given ten days' notice and an opportunity during the ten days to negotiate with the state board of land commissioners concerning a new lease.

(2) Prior to the quarter period beginning April 1, 1955, and prior to each quarter period thereafter, the board shall make a listing of all grazing and other agri-

cultural leases which expire within the second succeeding quarter period thereafter, giving a description of the land leased, the name of the lessee, and the expiration date of the lease. At least five days prior to the beginning of each such quarter period, a copy of such listing shall be certified to and transmitted by the board to the county clerk and recorder of each county in which any such land to be leased is situate and shall, by said county clerk and recorder, immediately upon receipt thereof, be posted in the courthouse in a conspicuous place to which the public has access and kept so posted until all leases listed thereon have expired. A copy of such quarterly listing shall also be posted at the times above provided in the main office of the state board of land commissioners, available for public inspection.

(3) (a) All applications to lease or to renew a lease shall be made in writing to the board, stipulating the rental the applicant is willing to pay and under such other regulations, not in conflict with the law, as the board may prescribe.

(b) The board shall require from any applicant for a lease that he give evidence of his responsibility to carry out the terms of the lease. Any applicant, except the present lessee, shall deposit with his application a sum of money equal to the first annual rental offered in his application.

(c) The board shall also require that an applicant state under oath the total acreage of agricultural or grazing land, if any, owned and to be operated by him in connection with the land to be leased, and the intended use, during the term of the lease, of both such private land, if

any, and public land, either as to agricultural products to be produced thereon, or as to the carrying capacity of such lands in terms of the number of livestock such tracts are expected to reasonably support; and, if a renewal, a history, for such period of time as prescribed by the board, of the past use of both such private land, if any, and public land, as to agricultural products produced and the number of livestock grazed thereon.

(4) The board may, in its discretion, offer for sale any land leased at any time during the term of the lease as though said lease had not been executed, or it may withdraw such land from sale during the full term of the lease.

(5) The board has power to cancel and terminate any lease at any time if it finds that a lessee has violated any of the provisions of the lease or made any false statement in his application therefor.

(6) The board shall as soon as practicable, and not more than thirty days after the close of every quarter period, post, in the main office of the board, a complete listing of leases executed during that quarter period, together with rental figures for the same.

36-1-119. *Lessee to purchase improvements.* Should anyone apply to lease any of the lands belonging to the state upon which there are improvements belonging to another party, before a lease shall issue, he shall file in the office of the state board of land commissioners a receipt showing that the price of the improvements, as agreed upon by the parties or fixed by the state board, has been paid to the owner thereof in full or shall make

satisfactory proof that he has tendered to such owner the price of the improvements so agreed upon or fixed by the board. If, by any mistake or error, any money has been paid on account of any sale or lease of state lands, it is the duty of the board to draw a voucher in favor of the party paying said money. On presentation of the voucher, the controller shall draw his warrant upon the state treasurer for the amount, and the state treasurer shall pay the same out of the fund into which such money was deposited or placed. If, through any fraud, deceit, or misrepresentation, any party procures the issuing of any lease for state lands, the board has the authority to cancel any such lease.

36-1-120. *Leases—lands in city limits.* Lands within city boundaries may be leased for a term not exceeding fifty years. All such leased lands shall be reappraised and classified at least every five years, and the lessee of all such lands shall pay any increased rental or forfeit the land so held. When any lease expires by limitation the holder thereof may renew the same in the following manner: At any time within the ninety days next preceding the expiration of the lease, the lessee, or his assigns, shall notify the register of his desire to renew the lease. If the lessee and the state board of land commissioners agree as to the valuation of the land, a new lease may be issued, bearing even date with the expiration of the old one, and upon like conditions. The former valuation shall not be decreased without the consent of the state board of land commissioners. Nothing in this section shall prohibit the state board of land commissioners from leasing any of the state lands to such party who secures to the state the greatest annual revenue. The state board of land com-

missioners may, in its discretion, offer the land for sale at the end of any period of five years, upon the application of the lessee, during the term of the lease, upon the same terms and in the same manner as though the lease had not been executed.

36-1-121. *Trespass—penalty—bond.* (1) Any corporation, company, or person using or occupying any state or school lands without lease, and any corporation, company, or person who shall use or occupy state or school lands for more than thirty days after the cancellation or expiration of a lease, and any corporation, company, or person who constructs a reservoir, ditch, railroad, public highway, telegraph or telephone line, or in any manner occupies or enters upon lands belonging to the state, without first having secured the authority and permission of the state board of land commissioners to so occupy the land for such purpose, shall be regarded as trespassers and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, and each day shall be considered a separate offense.

(2) In each case, where a bond has been furnished to the state board of land commissioners, the bondsmen of the lessee shall be equally liable with himself, and, in addition to the foregoing penalty, the state shall be allowed to collect as rental for the use of such lands a sum equal to the appraised value thereof for rental purposes, as fixed by the state board of land commissioners, and which value shall not be less than five cents per acre per annum. All suits under the provisions of this article shall be instituted under the direction of the attorney general, in the name of the people of the state of Colorado.

36-1-122. *Platting and sale in lots and blocks.* The state board of land commissioners may cause any portion of the state or school lands to be laid out in lots and blocks or other tracts by a recorded plat to be sold from time to time at public auction in such quantities and at such times as shall enable the state to realize the best prices for such lands.

36-1-123. *Purchase of necessary land by U. S.* Any state lands needed by the United States for irrigation works, other than the right-of-way for roads, bridges, canals, ditches, tunnels, pipelines, and telephone and transmission lines, shall be sold to the United States at a price not less than three dollars and fifty cents per acre, and without advertising or offering the same at public auction, and the state board of land commissioners shall direct the governor, secretary of state, and register to execute and sign, as provided in this article, on behalf of the state, a proper deed or other instrument of writing for such lands.

36-1-124. *Sale of state lands.* (1) The state board of land commissioners may at any time direct the sale of any state lands, except as provided in this article, in such parcels as they shall deem for the best interest of the state and the promotion of the settlement thereof. No lands belonging to the state, within the areas to be irrigated from works constructed or controlled by the United States or its duly authorized agents, shall on or after March 31, 1919, be sold except in conformity with the classification of farm units by the United States. After the withdrawal of lands by the United States for any irrigation project, no application for the purchase of state lands within the limits of such withdrawal shall be ac-

cepted, except upon the conditions prescribed in this section. All sales under this article, except those to the United States, shall be advertised in four consecutive issues of some weekly paper of the county in which such land is situated, if there is such paper; if not, then in some paper published in an adjoining county, and in such other papers as the board may direct.

(2) The advertisement shall state the time, place, and terms of sale, and the minimum price fixed by the board for each parcel, lot, block, or tract below which no bid shall be received. In all cases the land shall be offered in parcels, lots, blocks, or tracts consisting of not more than one section of land. Sales of state land shall be made only to citizens of the United States or to those who have declared their intention to become such, or to corporations organized under the statutes of the state or under the statutes of any other state in the United States, or under United States statutes, or to partnerships composed of persons who are either citizens of the United States or have declared their intention to become such; and all patents and certificates of purchase issued before March 31, 1919, to such persons, entities, or partnerships are validated. If any land is sold on which authorized improvements have been made by lessees, the improvements shall be appraised under the direction of the state board. When lands on which such improvements have been made are sold, the purchasers, if other than the owner of the improvements, shall pay the appraised value of the improvements to the owner thereof, taking a receipt therefor, and he shall deposit such receipt with the state board of land commissioners before he is entitled to a patent or certificate of purchase. All such receipts

shall be filed and preserved in the office of the state board of land commissioners.

(3) After receipt of a notice authorized by section 24-33-107 (2) (a), C.R.S. 1973, identifying lands alleged to have a unique economic or environmental value to the public, the state board of land commissioners shall not proceed with the sale of any lands identified in such notice unless such notice is withdrawn pursuant to section 24-33-107 (2) (c), C.R.S. 1973, or unless and until authorized by resolution or act of the general assembly or for two years thereafter, whichever first occurs. Thereafter, all the requirements of this article as to manner and terms of sale of state lands shall be deemed to have been met with respect to any sale of state lands made to the department of natural resources pursuant to the provisions of section 24-33-107 and article 1 of title 38, C.R.S. 1973.

36-1-125. *Sale—place—reservations.* (1) All sales of state lands shall be held at the state capitol unless otherwise directed by the state board of land commissioners. The state board of land commissioners may, in its discretion, reserve, in the advertisement of sale of any state or school lands, rights-of-way for irrigation and drainage ditches, canals, reservoirs, and other structures and for any roads or highways, and it shall reserve to the state all rights to all minerals, ores, and metals of any kind and character, and all coal, asphaltum, oil, gas, or other like substances in or under said land, and all geothermal resources and the right of ingress and egress for the purpose of mining, together with enough of the surface of the same as may be necessary for the proper and convenient working of such minerals and substances. All

patents and certificates of purchase on state or school lands issued before March 31, 1919, and in which a reservation of rights to minerals, ores, and metals of any kind or character whatsoever, or coal, asphaltum, oil, gas, and other like substances, or geothermal resources has been made are validated. The holders of such certificates of purchase of the owners of said lands so patented shall by contract, deed, or other agreement acknowledge or reconvey to the state the minerals and substances so reserved, and the state board of land commissioners is authorized to accept on behalf of the state such deeds and conveyances and to make such agreements as may be necessary to carry out the provisions of this article.

(2) When the conditions prescribed by statute have been complied with, the state board of land commissioners shall make and deliver to the purchaser a certificate of purchase, containing the name of the purchaser, a description of the land purchased, the sum paid, the amount remaining due, and the date on which each of the deferred payments falls due, and the amount thereof. Such certificate shall be signed by the president and countersigned by the register of the board, and a record of the same kept by him in a suitable book. When a purchaser of any state land has complied with all the conditions of the sale, and paid all purchase money with the lawful interest thereon, he shall receive a patent for the land purchased. The patent shall be signed by the governor, attested by the secretary of state, and countersigned by the register, and have the great seal of the state and the seal of the state board of land commissioners thereto attached. When so signed, the patent shall convey title; but all patents and certificates of purchase issued before March

31, 1919, describing the lands with reference to legal subdivisions shown by the United States official survey, or by lots, blocks, or tracts shown on a recorded plat, or by metes and bounds descriptions, are validated.

36-1-126. *Delinquent payments.* When any purchaser of land defaults for a period of thirty days in any of the payments of either principal or interest due upon the certificate of purchase issued to him, the certificate may be forfeited and the lands reverted to the state upon a notice to that effect mailed to the last known post office address of the puchaser, and which notice shall allow him thirty days additional in which to pay the indebtedness to the state.

36-1-127. *Forfeiture—new sale.* If any purchaser of state land, after receiving a certificate of purchase, as provided in section 36-1-125, fails to make any one of the payments stipulated therein, and the same remains unpaid for thirty days after the time when it should have been paid, as specified in the certificate, the state board of land commissioners, after issuing notice of forfeiture and allowing thirty days additional to pay the indebtedness as provided in section 36-1-126, may sell the land again. In the case of a sale, all previous payments made on account of such land shall be forfeited to the state. The land shall revert to the state and the title thereof shall be in the state as if no sale had ever been made.

36-1-128. *Place of payment—venue.* All moneys due and payable to the state board of land commissioners shall be paid at the office of the state board of land commissioners in the state capitol in the city and county of Denver, Colorado, and all actions for the recovery of same,

or for the cancellation of certificates of purchase, or for the cancellation of leases, or for the recovery of the possession of the land, actions of forcible entry and detainer, or ejectment, shall be brought in any court of competent jurisdiction in the city and county of Denver in the state of Colorado.

36-1-129. *Bonds of purchaser—waste.* When, in the judgment of the state board of land commissioners, a bond by the purchaser of state lands is necessary, the board shall require such purchaser to give a bond upon such conditions as the board may determine. In leasing state lands, the board shall require of the lessee such a bond securing the state against loss of rents or other loss or waste, or occupation of the land for more than thirty days after the cancellation or expiration of the lease of the lessee, unless the lessee becomes the purchaser of the land, and in no case shall the lessee be allowed to cut or use more timber than is necessary for the improvement of the land or for fuel for the use of the family of the lessee; and the cutting and hauling of timber to sawmills, to be sawed on shares, is expressly prohibited.

36-1-130. *Lost certificate of purchase.* When a certificate of purchase is lost or wrongfully withheld by any person from the owner thereof, the state board of land commissioners may receive evidence of such loss or wrongful detention, and upon satisfactory proof of the fact, may cause a certificate of purchase or patent, as the case may be, to be issued to such person as appears to them to be the proprietor of the land described in the original certificate of purchase.

36-1-131. *Determination of conflicting claims.* The state board of land commissioners may hear and deter-

mine the claims of all persons who claim to be entitled in whole or in part to any lands owned by this state, and the decisions of the board shall be held to be final, until set aside by a court of competent jurisdiction. The board also has power to establish such rules and regulations as in its opinion may be proper to prevent fraudulent applications.

36-1-132. *Lands sold subject to taxation.* All lands sold under the provisions of this article or any interest therein shall be subject to taxation, and the register of the state board of land commissioners shall furnish to the county assessor of each county on the first day of May of each year a list of the equities owned or acquired in all lands so sold, to whom sold, the price per acre, and the amount paid. Each county shall pay the expense incurred in compiling such list.

36-1-133. *Rebate of taxes on reverted land.* In case any lands sold under the provisions of this article are reverted to the state for any cause whatsoever, the register of the state board of land commissioners shall at once notify the county treasurer of the county in which the land is situated, and upon receipt of such notice it is the duty of the county treasurer to at once rebate all taxes that have been charged against the lands so reverted.

36-1-134. *Proceeds of sale—funds.* The funds arising from the sale of public school, university, and agricultural college lands shall be held intact for the benefit of the funds for which such lands were granted and shall be known as permanent funds, and the interest and rentals only shall be expended for the purpose of the grant. The funds arising from the sale, leasing, and income of all

other state lands shall be disposed of as provided by law, but in the absence of any other provisions, may be invested in the same manner as the school fund.

36-1-135. *Proceeds of leases—disposition.* All moneys arising from the leasing of agricultural college, university, or public school lands which, on or after March 31, 1919, are received by the state treasurer, shall be treated in all respects in the same manner as is provided by law for the disposition of the interest on the proceeds arising from the sale of the same class of lands.

36-1-136. *Rights-of-way granted—reversion.* The state board of land commissioners may grant rights-of-way across or upon any portion of state land for any ditch, reservoir, railroad, communication system, electric power line, pipeline, or other installation necessary for the operation of said services or utilities and may grant rights-of-way on any tracts of state land to any public agency or instrumentality of the United States, or to this state, or to any of the institutions, agencies, counties, municipalities, districts, or other political subdivisions of this state for the purpose of building schoolhouses or public roads or highways or for any public use or purpose. Any right-of-way so granted shall be on such terms as the board shall determine and shall be subject to the filing fee specified in section 36-1-112(1) (q). Said board may execute and sign, as provided by this article, on behalf of this state, an instrument in writing for such right-of-way or grant. This section shall not be construed to grant authority to said board to convey title to any such land by a grant of right-of-way. Whenever rights-of-way granted for any purposes mentioned in this section cease to be used for such purposes,

the rights-of-way shall terminate and all rights shall revert to this state or its successors in interest.

36-1-137. *Sale of lands to procure irrigation.* (1) For the purpose of furnishing irrigation for state lands, the state board of land commissioners is authorized, when, in their judgment, the interest of the state may be subserved thereby, to sell at public sale, at such place as the board may fix, at not less than the appraised value thereof, which in no case shall be less than the minimum price of three dollars and fifty cents per acre, any tract of arid land belonging to the state. Not more than one-half section of land shall be sold, and in alternate quarter sections, to any responsible person, on condition that the person construct an irrigation ditch in such locality, and of sufficient capacity to furnish water for the entire tract, and so located that the tract may be irrigated therefrom.

(2) Before any of the state lands shall be offered for sale, the party desiring to purchase the lands and construct a ditch shall enter into a contract with the board guaranteeing to bid at least the minimum price per acre, and to complete such ditch within given time, fixed by the board in the contract. The contract shall further provide that the party constructing such ditch shall furnish water for the remaining one-half section of the state lands at such reasonable rates as the board and the parties holding such ditch or canal may agree upon. Such contract shall be drawn by the attorney general, and signed by the president and register of the board, and by the party desiring to construct such ditch.

(3) If any person, other than the person making application for the purchase of the lands, is the highest bid-

der at the public sale thereof, such bidder shall, within such reasonable time as the board may fix, enter into a contract and bond, as required by the provisions of this article, for the construction of the ditch, and for the furnishing of water therefrom; and in the event of his failure to furnish a satisfactory bond and enter into the said contract within the time fixed, then such bid shall be disregarded and such public sale shall be void and of no effect. The board shall make the sale upon like conditions as other state lands are sold, and shall require a good and sufficient bond from the party desiring to construct such ditch, conditioned upon the faithful performance of the contract, and the conditions of the sale, and in no case shall the title to any of said lands pass from the state until the ditch has been completed and accepted by the board.

36-1-138. *Mineral section—personnel—duties.* (1) The state board of land commissioners is authorized to establish, under the jurisdiction of the register of the state board of land commissioners, a mineral section and appoint a superintendent of the same who shall have been a resident of the state for more than ten years last past, who shall be a mining man of known ability for at least ten years, and who shall be thoroughly familiar with mining and the underground workings of mines. It is the duty of the superintendent to inspect in person all mines and other works operated under leases from the state for the production of precious metals, coal, iron, oil, or other mineral products upon which rentals are due to the state upon a basis of a royalty upon the production therefrom, as often from time to time as he shall deem it necessary for the purpose of estimating and checking royalties therefrom, and keep such maps of the workings of all mines

as will give the land department full information concerning the same.

(2) Lessees of all mineral lands, including coal lands, shall be required to furnish the mineral superintendent of this section with copies or blueprints of all maps of underground surveys of leased land, made or authorized by such lessee, including engineer's field notes, certified to by the engineer who made the survey. He shall supervise all mining and require the same to be done in accordance with the best methods of mining. He shall also check the royalties reported as due under such lease for the preceding month and compare the same with the surveys and other inspections made by him; and shall report on or before the twentieth day of such month the result of such examination and checking to the state board of land commissioners. Every mine and other works upon the public domain of the state, held under lease therefrom by any person, association, partnership, or corporation shall be at all times subject to the inspection of the superintendent. He shall inspect and examine all lands held under lease from the state, providing for the payment of royalties from the production therefrom, and report to the state board of land commissioners the condition of said lands, the amount of work and development done thereon by such lessees, and make such recommendations relative thereto as he may deem advisable. A further sum of one thousand dollars annually shall be allowed the superintendent for expenses and employment of an assistant when needed for surveys, to be paid only upon voucher approved by the board and countersigned by the register. Before entering upon his duties as superintendent, the appointee of the state board

of land commissioners shall give bond to the state in the penal sum of ten thousand dollars, conditioned upon the faithful discharge of his duties.

36-1-139. *Royalties on coal—ton defined.* (1) Any person, association, copartnership, or corporation leasing and operating coal lands under the provisions of this article shall pay to the deputy register of the state board of land commissioners a minimum price of not less than fifteen cents for every ton of coal mined from said lands, except that the lands of the Fort Lewis school, in La Plata county, may be leased at a royalty of not less than ten cents per ton, to be paid monthly, on or before the twenty-fifth day of each month, for the coal mined during the preceding calendar month, and except that any person, association, copartnership, or corporation mining coal for the purpose of and to be used in the production of chemicals, synthetic fuels, and development of power at such plant of operation, shall pay to the deputy register of the state board of land commissioners a minimum price of not less than five cents for every ton of coal mined from said lands, if not less than two hundred fifty thousand tons per annum are mined by such person, association, copartnership, or corporation. Any amount less than two hundred fifty thousand tons shall be subject to the fifteen-cent royalty. Every lessee of any such coal lands shall pay royalty based upon the maximum extraction possible by means of modern mining methods and with consideration of the local conditions of the coal seam or seams being operated. All coal produced from lands leased for the operation of plants to produce chemicals, synthetic fuels, and for the development of power

shall be used in such plants exclusively and shall not be sold on the open market.

(2) Should the person, association, copartnership, or corporation leasing coal lands fail to mine during any one year the minimum amount that may be provided for in the terms of the lease, then the amount as paid shall be applied as an advance payment of royalty upon coal actually mined in any subsequent year in excess of the minimum provided for in said lease.

(3) The term "ton" as used in this section means twenty-seven cubic feet of coal, measured in solid, and shall be ascertained by the measurements of the space from which the coal is mined, deducting therefrom all space occupied by slate or other impurities. Such measurements shall be made by the mineral section, according to the provisions of this article. When possible and when the state board of land commissioners shall so order, the coal tonnage may be determined by the coal miners' payroll check number or railroad shipment, and such miners' check number and coal tonnage, determined by weight at the mine tipple, shall be clearly enumerated in the required monthly sworn royalty statements.

36-1-140. *Mineral locations—posting—lease.* Location of mineral claims, may be made upon unleased mineral lands belonging to the state. The discoverer of a body of mineral in either a lead, lode, ledge, deposit, vein, or contact shall immediately post conspicuously a notice declaring that he has made such a discovery on the date attached to the notice. Within ten days after posting said notice, the discoverer must notify the state board of land commissioners of said discovery and arrange for a permit

to explore the extent of the discovery. Within sixty days from date of discovery, the locator shall be required to take a lease upon such terms as may be agreed upon by the state board of land commissioners or apply for an extension of the permit.

36-1-141. *Exchange of lands with governments.* The state board of land commissioners is authorized to exchange any lands, the income from which is devoted to the public schools of the state, the state universities, the state agricultural college, penitentiary, internal improvements, saline, or any other lands which may be under the control of the state board of land commissioners, and which may have been granted to the state by the congress of the United States, for such unappropriated federal lands in the state as the state board of land commissioners may select. The register of said board is empowered to sign all papers necessary to such transfer, under the direction of the board.

36-1-142. *Receipts from agricultural lands.* The state board of land commissioners is required to transmit or cause to be transmitted to the secretary of the state board of agriculture, as the same are received, statements showing each item of receipt of money from all leases or sales and royalties, or as interest on purchase money passing through its hands, derived from agricultural college land grant land, which statement shall name and describe the lands to which the money paid applies, from whom and for what received, and whether the item is credited to land income or permanent fund.

36-1-143. *Statement to board of agriculture.* (1) On or before the second Wednesday in December of every

year, the state board of land commissioners shall furnish to the state board of agriculture a complete statement of all transactions had by them in connection with agricultural college lands, which statement shall show:

(a) Amounts received from sales of such lands, describing the lands sold and the price received for each tract and giving the name of the purchaser;

(b) Amounts received from leases and royalties, describing the lands leased from which such income is derived, and giving the name of the lessee or operator;

(c) Amounts received as interest on purchase money and other items, giving the name of the payer;

(d) Amounts due and unpaid on purchases and leases and other delinquencies, if any;

(e) Such other items as will enable said state board of agriculture to keep informed as to the condition of said lands, the income therefrom, and the manner in which the same are being administered.

36-1-144. *Agreements with general agencies.* The state board of land commissioners is authorized to enter into cooperative agreements on behalf of the state with any federal agency for the improvement and betterment of state owned lands, and to furnish necessary materials and tools in connection therewith.

36-1-145. *Land commissioners' receipts—appropriation.* (1) All moneys collected by the state board of land commissioners shall be deposited with the state treasurer. Moneys received by the state board of land commissioners for fees and services, except fees collected under the provisions of section 36-1-112, shall be credited by the state treasurer to the general fund of the state. All other moneys deposited by the state board of land commissioners shall be credited by the state treasurer to the proper funds as provided by law.

(2) The general assembly shall annually appropriate from the general fund of the state sums sufficient for the operation of the state board of land commissioners.

36-1-146. *Acquisition of right-of-way.* (1) At the direction of the governor, the state board of land commissioners is authorized to acquire a right-of-way for the purpose of obtaining access to public lands located in section 16, township 6 south, range 69 west of the sixth principal meridian, Jefferson county, Colorado, by donation, purchase, or by the exercise of the power of eminent domain through condemnation proceedings in accordance with law.

(2) There is appropriated out of the land commissioners' expense fund as set forth in section 36-1-145 the sum of fifteen thousand dollars, or so much thereof as is necessary, to be used by said board for the acquisition of such right-of-way and for all necessary and actual expenses in connection therewith. This appropriation shall

be made available on or after March 28, 1963, and shall remain available until the acquisition of the right-of-way authorized by this section.

36-1-147. *Geothermal leases.* (1) The state board of land commissioners may lease any portion of the land of the state, or any interest therein, for the purposes of exploring for, producing, and developing the geothermal resources thereunder at a rental to be determined by the board, except as provided in sections 36-1-113 and 36-1-118.

(2) The geothermal leasing arrangements authorized by subsection (1) of this section shall include provision for:

(a) The filing of a surety bond to assure compliance with the lease terms and the requirements of article 70 of title 34, C.R.S.;

(b) Royalties on both the geothermal resource and its by-product;

(c) The protection of the environment, including but not necessarily limited to the air quality, the ground and surface water quality, and the land surface, as well as the rest of the environment.

(3) The geothermal leasing arrangements authorized by subsection (1) of this section are to be administered by the state board of land commissioners in a manner which encourages the maximum economic recovery of geothermal resources, prevents waste of said resources, and protects the public interest in the lands of the state by requiring the exploration for the development and protection of geothermal resources to proceed in an environmentally acceptable manner.

(4) All existing leases on state lands for the development of geothermal resources are hereby validated as though they had been issued pursuant to the authority of this article.

36-1-148. *Land commissioners land and water management fund.* (1) There is hereby created a state board of land commissioners land and water management fund. Such fund is to be generated from fees collected under the provisions of section 36-1-112. The fund is to be under the control of and to be administered by the state board of land commissioners. The fund is to be used only for the management and the improvement of state-owned lands and waters under the control of the state board of land commissioners. Each such improvement or management program is to be for the purpose of securing the optimum possible revenue from such land or water as provided in section 10 of article IX of the state constitution; except that for each such improvement made to state-owned lands utilized for agricultural purposes, the lessee shall contribute no less than twenty percent of the cost of such improvement, by written agreement with the state board of land commissioners.

(2) The state treasurer shall establish such fund from fees submitted pursuant to section 36-1-112. All such fees submitted shall be credited to such fund. Expenditures from such fund shall not exceed fifty thousand dollars in any fiscal year. Any amount in the fund in excess of fifty thousand dollars at the close of a fiscal year shall be forthwith transferred by the state treasurer to the state general fund. Any balance in said fund at the close of a fiscal year not in excess of fifty thousand dollars shall

remain in the fund and shall constitute the fund for the beginning of the next fiscal year.

(3) The controller shall authorize disbursements from said fund as directed by the state board of land commissioners on receipt of a voucher from said commissioners stating that the disbursement is to accomplish a purpose set forth in subsection (1) of this section.

(4) The state board of land commissioners shall submit an annual report of the moneys expended from the fund and matters accomplished by such expenditures for the preceding fiscal year to the general assembly by the convening date of each regular session of each assembly. The filing of said report in accordance with section 24-30-208(9), C.R.S. 1973, shall be deemed sufficient compliance with the provisions of this subsection (4).

(5) This section is repealed, effective January 1, 1985.

APPENDIX 4

COLORADO STATE BOARD OF
LAND COMMISSIONERS

620 Centennial Bldg., 1313 Sherman St.
Denver, Colorado 80203
866-3454

GENERAL INFORMATION REGARDING LEASING OF STATE-OWNED MINERALS

OIL AND GAS LEASES: Leases are offered on a competitive bid basis. Public, oral auctions are normally held on the third Wednesday of each calendar month. Lotteries or drawings are NOT held by the State of Colorado.

Minimum bid is the first year's rental of $1 per acre, plus filing fee as follows: $12.75 for the first 160 acres, or fraction thereof, in the lease; and $1.50 for each additional 160 acres, or fraction thereof, in the same lease. The bidding beyond the minimum bid is *bonus.* Bonus bids are on a per-acre basis and are a one-time payment in addition to the rental and fee. The lease will be awarded to the highest bidder. All monies are due and payable at the auction. Sight drafts will not be accepted. The Board reserves the right to reject any and all bids. Sales are not final until confirmed by the Board, normally at their first regular Sunshine Meeting (usually Monday) following the auction.

Lease term is five years, primary; five years, secondary. Rentals double for the extended five-year term.

Announcement of auction is mailed to all parties on the current mailing list. The enclosed form received by this office is a request for addition to the mailing list.

Selection of tracts to be included are either by request from individuals, industry representatives, or Board option. Requests may be made orally or in writing. The inclusion of a tract which has been requested places no obligation to lease on either the Board or the person making the request. Requests must be received by the first day of the month preceding the auction to be included on the following month's list, i.e., September 1 would be the deadline for the October auction.

Surety bond requirements: A surface restoration bond in the amount of $5,000 for each drill site is required before commencement of development operations. The operator or his agent must contact the surface user well in advance to agree upon access and to solve other problems. After operations have been completed and the surface has been restored, a representative of the Board will check the site and evaluate the amount of damages, if any, to be paid. When all just claims have been paid, the bond will be terminated.

Exploration permits: A permit from this Board is required before exploration activities are commenced. Information regarding permit requirements will be furnished upon request.

COAL LEASES: Like oil and gas, these leases are offered on a competitive bid basis. Requests are reviewed by the Board and questionnaires mailed to various county, state, and federal agencies. Surface users (where known) are notified. Final inclusion of a given tract on the auction list may follow. Auctions are held in conjunction with the oil and gas lease auctions; however, less frequently. (See oil and gas leasing procedure.) Lease term is

ten years. Rentals are $1 per acre per year. Filing fee is the same as for oil and gas leases. Advance minimum royalty is due and payable beginning the sixth year of the lease, as follows: Sixth year—$6 per acre; seventh year—$7 per acre; eighth year—$8 per acre; ninth year—$9 per acre; tenth year—$10 per acre. Advance royalty payments may be applied against production royalty due if production commences before the end of the tenth year. Exploration permits are required (see above).

HARD ROCK AND OTHER TYPES OF MINERALS LEASES: These may be offered on a competitive bid basis. Applications accompanied by the proper nonrefundable filing fee may be filed for available state-owned lands. Questionnaires are mailed to various county, state, and federal agencies. Surface users (where known) are notified. Board reviews all responses and determines issuance of a lease. Term is ten years for hard rock minerals. Five years for sand, gravel, and other surface materials. Rentals are $1 per acre per year. Sand and gravel *permits* may be issued for a fee of $50. Permits do not guarantee exclusive right to an area. Exploration permits are required (see above).

All annual rentals are in addition to royalties.

Sample lease forms are enclosed where applicable.

Questions should be directed to the above address.

APPENDIX 5

(SEAL)

In Reply Refer to
CO-931
C-3581
2620

United States Department of the Interior
Bureau of Land Management
Colorado State Office
Room 700, Colorado State Bank Building
1600 Broadway
Denver, Colorado 80202

Jan 27 1978

Mr. Anthony Sabatini
State Board of Land Commissioners
Room 620, Centennial Building
1313 Sherman Street
Denver, CO 80203

Dear Mr. Sabatini:

This is to keep you informed of our progress toward completing an audit of state indemnity selections. I had hoped by now to have a complete list of lands for which indemnity has not been satisfied but that has not been possible because of the need for more research, and in some cases, legal review of some situations.

It is clear now that the indemnity account is not overdrawn. The following townships, created by survey or by protraction appear to involve unsatisfied indemnity.

	Entitlement (acres)
Sixth Principal Meridian, Colorado	
T. 18½ S., R. 54 W.	320
T. 6 S., R. 82½ W.	640
New Mexico Principal Meridian, Colorado	
T. 39½ N., R. 2 W.	320
T. 37 N., R. 2½ W.	320
T. 39½ N., R. 3 W.	320
T. 39½ N., R. 4 W.	320
T. 37 N., R. 4½ W.	320
T. 38 N., R. 4½ W.	320
T. 39 N., R. 4½ W.	320

I believe this is but a small part of the acreage for which indemnity is outstanding but it will provide a start for you to consider areas in which you might want to select lieu lands.

Sincerely yours,
/s/ Dale R. Andrus

State Director, Colorado

APPENDIX 6

(SEAL)

Commissioners

Rowena Rogers
Wm. H. Claire
Tommy Neal

Anthony Sabatini
Administrator

Thomas E. Bretz
Minerals Director

Robert L. Hapgood
Chief Accountant

BOARD OF LAND COMMISSIONERS
Department of Natural Resources
620 Centennial Building
1313 Sherman St., Denver, Colorado 80203
(303) 839-3454

September 4, 1979

Mr. Dale Andrus, State Director
U. S. Department of the Interior
Bureau of Land Management
Colorado State Office
Room 700, Colorado State Bank Building
1600 Broadway
Denver, Colorado 80202

Attention: Chief, Land Adjudication Branch

Dear Mr. Andrus:

On the basis of the enclosed forms 4-1681 and 2400-7, this application is being submitted for the use and benefit of the State Board of Land Commissioners for School Indemnity Selections under Public Law (72 Stat. 928) Sections 2275 and 2276 of the revised statutes as amended (43. U.S.C. 851, 852). We are enclosing our State Warrant to cover the required non-refundable application service charge of $5.

Base Lands

Archuleta County, Colorado

Sec. 36	Twp. 34N	Range 1½W	64.35 acres
Frac Twp	Twp. 37N	Range 2½W	320.00 acres
Sec. 16	Twp. 34N	Range 3W	267.52 acres

Eagle County, Colorado

Sec. 36	Twp. 6S	Range 82½W	640.00 acres

Garfield County, Colorado

Sec. 36	Twp. 6S	Range 105W	370.55 acres
Sec. 36	Twp. 7S	Range 105W	352.08 acres
Sec. 36	Twp. 8S	Range 105W	348.52 acres

Gunnison County, Colorado

Sec. 36	Twp. 51N	Range 3½E	48.32 acres
Sec. 36	Twp. 46N	Range 1½W	8.81 acres

Hinsdale County, Colorado

Sec. 16	Twp. 37N	Range 3W	320.00 acres
Frac Twp	Twp. 39½N	Range 3W	320.00 acres

Kiowa County, Colorado

Frac Twp	Twp. 18½S	Range 54W	320.00 acres

Kit Carson County, Colorado

Sec. 36	Twp. 5½S	Range 46W	89.12 acres

La Plata County, Colorado

Sec. 16	Twp. 32N	Range 9W	320.00 acres
Sec. 16	Twp. 32N	Range 13½W	640.00 acres

Mesa County, Colorado

Frac Twp	Twp. 8½S	Range 93W	320.00 acres

Mineral County, Colorado

Frac Twp	Twp. 39½N	Range 2W	320.00 acres

Montezuma County, Colorado

Frac Twp	Twp. 32N	Range 14W	320.00 acres
Frac Twp	Twp. 32N	Range 15W	320.00 acres
Frac Twp	Twp. 32N	Range 16W	320.00 acres

Rio Grande County, Colorado

(Frac. pt. of base)

Sec. 36	Twp. 39N	Range 3½W	301.60 acres
Sec. 36	Twp. 37N	Range 5½E	189.13 acres

Saguache County, Colorado

Sec. 36	Twp. 48N	Range 4½E	320.00 acres

Total Base Lands 6,840.00 acres

Selected Lands
Rio Blanco County, Colorado
Twp. 3S Range 97W

Sec. 17	SE¼ SE¼	40.00 acres
Sec. 20	E½	320.00 acres
	S½ SW¼	80.00 acres

Rio Blanco County, Colorado
Twp. 3S Range 97W

Sec. 21	N ½	320.00 acres
	S ½	320.00 acres
Sec. 22	W ½	320.00 acres
Sec. 27	NE ¼ SW ¼	40.00 acres
	W ½ SW ¼	80.00 acres
	NW ¼	160.00 acres
Sec. 28	N ½	320.00 acres
	S ½	320.00 acres

Sec. 29	N ½	320.00 acres
	SE ¼	160.00 acres
	SW ¼	160.00 acres
Sec. 30	E ½ SE ¼	80.00 acres
	SW ¼ SE ¼	40.00 acres
Sec. 31	E ½	320.00 acres
	E ½ SW ¼	80.00 acres
	SE ¼ NW ¼	40.00 acres
Sec. 32	NE ¼	160.00 acres
	S ½	320.00 acres
	NW ¼	160.00 acres
Sec. 33	N ½	320.00 acres
	NE ¼ SE ¼	40.00 acres
	SE ¼ SE ¼	40.00 acres
	W ½ SE ¼	80.00 acres
	SW ¼	160.00 acres
Sec. 34	W ½ SW ¼	80.00 acres
	NW ¼ NW ¼	40.00 acres

Twp. 4S Range 97W

Sec. 4	NW ¼NE ¼ (Including Lot 2)	40.00 acres
	SW ¼ SE ¼	40.00 acres
	SW ¼	160.00 acres
	NW ¼ (Including Lots 3 and 4)	160.00 acres
Sec. 5	NE ¼ (Including Lots 1 and 2)	160.00 acres
	NE ¼ SE ¼	40.00 acres
	S ½ SE ¼	80.00 acres
	NW ¼ SE ¼	40.00 acres
	W ½ (Including Lots 3 and 4)	320.00 acres

Rio Blanco County, Colorado
Twp. 4S Range 97W

Sec. 6	E ½ (Including Lots 1 and 2)	320.00 acres
	SW ¼ (Including Lots 6 and 7)	160.00 acres
	NW ¼ (Including Lots 3, 4, and 5)	160.00 acres
Sec. 9	N ½ NW ¼	80.00 acres

Twp. 4S Range 98W

Sec. 1 E ½ E ½ 160.00 acres

Total Selected Lands 6,840.00 acres

The causes of loss of the herein described Base Lands is due to the following:

1. Within *see below* National Forest prior to survey.
2. Within Ceded Indian Lands prior to survey.
3. The extent that a surveyed school section lacks 640.00 acres, due to the section being fractional in quantity. (43 USC-851, 852)
4. The extent that the surveyed township lacks school sections due to the township being fractional or from any natural cause whatever. 43 USC-851, 852)

Base Lands
Archuleta County, Colorado

			Cause of Loss
Sec. 36	Twp. 34N	Range 1½W	1-San Juan, 3 & 4
Frac Twp	Twp. 37N	Range 2½W	1-San Juan & 4
Sec. 16	Twp. 34N	Range 3W	2, 3 & 4

Eagle County, Colorado

Sec. 36	Twp. 6S	Range 82½W	1-White Riv. & 4

Garfield County, Colorado

Sec. 36	Twp. 6S	Range 105W	2, 3, & 4
Sec. 36	Twp. 7S	Range 105W	2, 3 & 4
Sec. 36	Twp. 8S	Range 105W	2, 3 & 4

Gunnison County, Colorado

Sec. 36	Twp. 51N	Range 3½E	1-Gunnison, 3 & 4
Sec. 36	Twp. 46N	Range 1½W	4

Hinsdale County, Colorado

Sec. 16	Twp. 37N	Range 3W	1-San Juan, 3 & 4
Frac Twp	Twp. 39½N	Range 3W	1-Rio Grande & 4

Kiowa County, Colorado

			Cause of Loss
Frac Twp	Twp. 18½S	Range 54W	4

Kit Carson County, Colorado

Sec. 36	Twp. 5½S	Range 46W	3 & 4

La Plata County, Colorado

Sec. 16	Twp. 32N	Range 9W	2, 3 & 4
Sec. 16	Twp. 32N	Range 13½W	2, 3 & 4

Mesa County, Colorado

Frac Twp	Twp. 8½S	Range 93W	1-Grand Mesa & 4

Mineral County, Colorado

Frac Twp	Twp. 39½N	Range 2W	1-San Juan & 4

Montezuma County, Colorado

Frac Twp	Twp. 32N	Range 14W	2, 3 & 4
Frac Twp	Twp. 32N	Range 15W	2, 3 & 4
Frac Twp	Twp. 32N	Range 16W	2, 3 & 4

Rio Grande County, Colorado

Sec. 36	Twp 39N	Range 3½W	1-Gunnison & 4
Sec. 36	Twp. 37N	Range 5½E	1-Rio Grande & 4

Saguache County, Colorado

Sec. 36	Twp. 48N	Range 4½E	1-Gunnison, 3 & 4

It is hereby certified that the State of Colorado has not heretofore assigned said bases or any portion thereof in any list now pending or completed.

It is hereby certified that the lands selected for School Indemnity are unappropriated and are not occupied, claimed, improved or cultivated by any person adversely to the State.

It is hereby certified that the said Selected lands do not contain any springs, waterholes or other bodies of water needed or used by the public for watering purposes, further that the said lands contain no hot springs or other springs having curative properties.

It is hereby certified that the lease lands lost have been determined to be mineral in character by the Colorado Geological Survey. It is further certified that the Colorado Geological Survey has determined that the selected lands are mineral in character since said lands contain oil shale deposits.

It is hereby certified that there has been no indemnity granted for the herein described Base lands nor is there any previous Selection pending.

It is further certified that the amount of Selection herein described does not exceed the total amount of Indemnity Selections due the State of Colorado.

It is hereby certified that no instrument, purporting to convey or in any way encumber the title to any of the lands used as base or bases has been issued by the State or its agents on those lands in this State Indemnity Application.

It is hereby certified that the State Board of Land Commissioners was created under Article IX, Section 9 of the Constitution of the State of Colorado; and that under Article IX, Section 10 of the Constitution, the State Board

of Land Commissioners shall have the duty of selecting lands which may be granted to the State by the general government under such regulations as may be prescribed by law. (Colorado Revised Statutes 1973, Chapter 36-1-105.)

The selection made herein only constitutes a portion of the lands to which Colorado is entitled. The Bureau of Land Management has determined that Colorado is entitled to indemnity for 11,482.31 acres. The selection made herein comprises only 6,840.00 acres. One or more supplemental selections will be made for the remaining acreage of the states entitlement.

IN WITNESS WHEREOF, I, Rowena Rogers, President; Tommy Neal, Register; and Wm H Claire, Engineer, of the State Board of Land Commissioners have hereto set our hands and the seal of the said Board on this 4th day of September, A. D. 1979.

/s/ Rowena Rogers
President, State Board of
Land Commissioners

/s/ Tommy Neal
Register, State Board of
Land Commissioners

/s/ Wm H Claire
Engineer, State Board of
Land Commissioners

(SEAL)

Received by Bureau of Land Management on this 4th day of September, 1979.

By B. McDougal
Title Cashier

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

STATE APPLICATION FOR SELECTION
Sections 2275 and 2276 of the Revised Statutes
(43 U.S.C. 851, 852), as amended,
and other State grant Acts

1. Name of Selecting Agent (First, middle initial, last)

State of Colorado, Acting by and Through State Board of Land Commissioners

Address

Room 620, Centennial Building
1313 Sherman Street
Denver, CO 80203

2. I CERTIFY that:

a. This application for the selection of the public lands which are described in the attached papers is made under and pursuant to the laws of the State of Colorado

b. What is your official title?

Rowena Rogers, President; Tommy Neal, Register; Wm H Claire, Engineer

c. What authority do you have to make this selection in behalf of the State?

Article IX, Section 10 of the Constitution of the State of Colorado stipulates that the State Board of Land Commissioners shall have the duty of selecting lands that may be granted to the State by the general government under such regulations as may be prescribed by law. (Colorado Revised Statutes 1973, Chapter 36-1-105)

d. Insofar as the application does not involve the selection of a mineral estate, no portion of the related land is occupied for any purpose by the United States and that the land is unoccupied, unimproved, and unappropriated by any person claiming the land other than the applicant.

e. Have you attached to this application the information required in 43 CFR, Part 2701

[X] Yes ☐ No

President /s/ Rowena Rogers
Register /s/ Tommy Neal
Engineer /s/ Wm H Claire

(Date) 9-4-79 (Signature)
(SEAL)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
PETITION FOR CLASSIFICATION

A Petition to Classify and Open Public Lands to Entry or Otherwise to Make Them Available for Disposition

Notice to Petitioner—Applicant

Your application (which must be attached hereto) requires the Secretary of the Interior to take an action that is entirely within his discretion. The basis for the Secretary's authority and the policies and procedures which he has established under that authority, are described in the regulation 43 CFR 2410, 2430, and 2450. A copy of these regulations can be secured from any land office of the Bureau of Land Management.

PETITION

I HEREBY PETITION The Secretary of the Interior to have the lands described in the attached application classified or otherwise made available for entry or disposition pursuant to my application.

I understand that if the Authorized Officer of the Bureau of Land Management does not make the lands available for disposition pursuant to my application, the regulations (43 CFR 2450) are applicable to my case.

The State of Colorado, Acting by and Through The State Board of Land Commissioners

President /s/ Rowena Rogers
Register /s/ Tommy Neal
Engineer /s/ Wm H Claire

(Date) (9-4-79) (Signature of Petitioner-Applicant)

(SEAL)

(3)

No. 84-1621

Office-Supreme Court, U.S.
FILED
JUN 28 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

OCCIDENTAL OIL SHALE, INC.,

Petitioner,

v.

STATE BOARD OF LAND COMMISSIONERS OF COLORADO AND ITS MEMBERS, ROWENA ROGERS, JOHN S. WILKES, III AND TOMMY NEAL,

Respondents.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

REPLY BRIEF

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June 28, 1985

BEST AVAILABLE COPY

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No. 84-1621

IN THE

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OCCIDENTAL OIL SHALE, INC.,

Petitioner,

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STATE BOARD OF LAND COMMISSIONERS OF COLORADO AND ITS MEMBERS, ROWENA ROGERS, JOHN S. WILKES, III AND TOMMY NEAL,

Respondents.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

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REPLY BRIEF

Petitioner Occidental Oil Shale, Inc. ("Occidental") files this Reply Brief in response to the Brief in Opposition dated June 18, 1985, filed by the Respondents. Occidental's Petition contains a list of its parents and affiliates at page (ii).

SUMMARY OF ARGUMENT

A federal question is properly presented for certiorari review in this case because:

(i) this action involves the grant of school indemnity lands under a solemn agreement between the state and federal government; and

(ii) the Colorado Supreme Court clearly stated that its interpretation of that grant was based on its understanding of *Andrus v. Utah,* 446 U.S. 500 (1980) *("Andrus").*

Occidental seeks certiorari review because the Colorado Supreme Court concluded that *Andrus* repudiated the long-standing principle that equitable title to school indemnity lands vests in a public land state immediately upon selection. Under its interpretation of *Andrus,* the Colorado Supreme Court felt compelled to narrowly construe a Colorado mining location statute. The effect of that construction was to invalidate Occidental's existing mining claims.

Although this case was decided on federal law, Respondents nevertheless urge that this Court deny certiorari review because of possible independent state grounds which might support the decision below. Yet, no such grounds were adopted or even discussed by the Colorado Supreme Court. The clear presentation of a federal question involving an important public land grant and the need to correct the misapplication of federal law make certiorari review appropriate in this case.

ARGUMENT

1. The Colorado Court's decision rests upon federal law; that court's reliance on *Andrus* is clear.

Contrary to Respondents' assertion "[t]hat [the Colorado Supreme Court] decision does not involve a federal question,"[1] this case clearly presents a federal question—the construction of the grant of school indemnity lands pursuant to 43 U.S.C. § § 851, 852 (1982) and the Colorado Enabling Act.[2] The Colorado Supreme Court construed that grant and, in so doing, expressly relied upon the Taylor Grazing Act[3] and the construction of that Act in *Andrus.* The Colorado Supreme Court analyzed *Wyoming v. United States,* 255 U.S. 489 (1921) *("Wyoming"),* and the effect of *Andrus* upon the precedent of *Wyoming.* In *Wyoming,* this Court held that equitable title to selected lands vests upon selection. 255 U.S. at 496-97. Although the vesting of equitable title was not an issue before the State Board or the Denver District Court, it became the determinative issue in the Colorado Supreme Court.

Before this case was appealed to the Colorado Supreme Court, the parties stipulated that Colorado received full equitable title to and interest in the selected lands in accordance with *Wyoming.*[4] The State Board, in administrative action below, maintained that, although Colorado had full equitable title to the selected lands, it could not grant rights in those lands without legal title thereto. On appeal, the Denver District Court reversed the State Board on the

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[1]Brief in Opposition at 5.

[2]Act of March 3, 1875, § 7, 18 Stat. 474.

[3]43 U.S.C. § § 315, 315f (1982).

[4]See Petition, Appendix D at page 14a.

ground that Colorado, holding equitable title, had such an interest in the selected lands so as to open such lands to mineral location under Colo. Rev. Stat. § 36-1-140 (1973).[5]

The State Board and the Denver District Court each determined that Colorado had equitable title, but reached opposite conclusions about the State's ability to open those lands to mineral location prior to obtaining legal title thereto. The State Board believed that it could not commit the lands to mineral location holding only equitable title. However, the District Court concluded that equitable title was sufficient to open the selected lands to mineral location. On appeal, the Colorado Supreme Court disagreed with both the State Board and the Denver District Court because, under its interpretation of *Andrus,* equitable title to selected lands no longer vests upon selection.

> In *Andrus v. Utah,* 446 U.S. 500, 100 S. Ct. 1803, 64 L. Ed. 2d 458 (1980), however, the United States Supreme Court concluded that the nature of the federal government's role in the approval of a state's selection of indemnity lands was altered by a combination of congressional legislation and executive withdrawals of federal lands from disposal after *Wyoming v. United States* was decided.

Occidental Oil Shale, Inc. v. State Board of Land Commissioners, 692 P.2d 321, 324 (Colo. 1984). The Colorado Court went on to conclude that *Andrus* had "undermined" the precedent of *Wyoming.* The court reasoned that because substantial changes had occurred in the nature of the federal role after *Wyoming,* public land states had been divested of the equitable title to selected lands described in *Wyoming.* Respondents' contention that the Colorado

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[5]See Petition, Appendix C at page 12a.

Supreme Court did not hold that equitable title does not vest upon selection (Brief in Opposition at 10) is just not credible, as evidenced by the following statement of that court:[6]

> The foundation in *Wyoming v. United States* for the conclusion that the state has an equitable interest in selected lands has been undermined by the subsequent legislation and executive action described in *Andrus*.... Therefore, contrary to the situtation existing at the time *Wyoming v. United States* was decided, a state now obtains no assurance that it will receive all or any selected indemnity lands until the Secretary of the Interior makes the discretionary classification decision.

692 P.2d at 324. Without question, the Colorado Supreme Court based its decision upon federal law; it cited *Andrus* six times, and *Wyoming* seven times, and failed to cite any independent authority or reasoning under Colorado law which the Respondents now claim exists.

This Petition should be granted because the Colorado Supreme Court has erroneously extended the holding of *Andrus* beyond the intention of this Court by assuming that because the Secretary of the Interior is entitled to classify lands as proper for acquisition through selection, no rights to selected lands vest "until classification." 692 P.2d

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[6]Furthermore, Respondents' assertion (Brief in Opposition at 11) that "[t]hroughout this case, the Colorado Land Board has maintained that it obtained an equitable interest in the selected lands upon the filing of its selection list" directly contradicts positions taken by Respondents during oral argument before the Colorado Supreme Court, as well as Respondents' reliance upon the Utah Supreme Court interpretation of *Andrus* in *Justheim v. Division of State Lands*, 659 P.2d 1075 (Utah 1983)—a case holding that selecting states obtain *no* interest in selected lands upon selection.

at 324. See Petition at 10-11. Certiorari review of this case is appropriate to correct a mistaken interpretation of federal law, so that questions of state law may be reconsidered free from such misunderstanding. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 104 S.Ct. 2267, 2277 (1984). *See also South Dakota v. Neville*, 459 U.S. 553 (1983); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977); *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 630-32 (1973).

2. The Colorado decision contains no plain statement that the case was decided on state grounds.

Respondents' contention that the decision below rests on state law is wholly inconsistent with the clear language of the Colorado decision.[7] Respondents suggest that this Court undertake a review of Colorado law to find possible, but unmentioned, independent state grounds to support the decision below. Such a review is inconsistent with this Court's determination that:

> when ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that

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[7]Moreover, Respondents' contention that Occidental did not follow the applicable mining law is without merit. There are neither findings nor evidence in the record to support findings that "Occidental attempted to circumvent the usual mineral leasing practices of the Colorado Land Board" as suggested by Respondents in their "Statement of the Case." See Brief in Opposition at 2. The Denver District Court upheld Occidental's mineral locations as lawful, and the Colorado Supreme Court reversed the lower court solely because of its interpretation of *Andrus*.

> the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 3476 (1983). Accordingly, this Court will not infer from all possible sources of state law what the Colorado Supreme Court might have meant. The decision of the Colorado Supreme Court rests primarily on that court's interpretation of *Andrus*. There is no suggestion, much less a plain statement, that the Colorado Court relied upon *Andrus* only for purposes of guidance, or that the court decided the case on state grounds.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Colorado Supreme Court.

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June 28, 1985